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TO WHICH IS ADDED A CHAPTER ON

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AUTHOR OF "A MANUAL OF MARINE INSURANCE," "PORT OF REFUGE," ETC.

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PREFACE TO THE FOURTH EDITION.

DURING the years which have elapsed since the last edition of this Handbook was issued, many great and important changes have taken place. I do not avoid the truism contained in this sentence, because the past dozen years have been *unusually* fruitful in novelty, affecting every province of human thought and activity; and with regard to the subject treated of in the present volume, the statement is particularly exact. If, for example, we watch the material advance of science, we see wood driven out of the field by iron; and, again, iron itself being displaced by steel. We observe the propulsion of ships by sails being given up before the rapid strides by which steam navigation progresses; and we notice the advent of electricity as a competitor with steam in locomotion. And whilst the physical methods of maritime commerce are thus in transition, our attention is called equally to what is passing on the non-material side; in customs, practice, and the pronouncements of law, relating to marine commerce, shipping, insurance, and average. We may safely say that in no previous decade has so much and general consideration been given to these subjects, subjects which occupy a large field in what may be called the ethics of commerce. At

no time have English Courts of law had so frequently before them cases of difficulty in principle and intricacy in detail connected with shipping and marine insurance. Never before have conflicting views been more warmly attacked and more stoutly defended ; nor has litigation been previously more frequently carried upward from one tribunal to another.

The period we speak of has also been signalised by many gatherings in this country and abroad, having the object of reforming and systematising international law ; of which subject, Average was made to form an important part, and at the meetings had always a prominent place assigned to it. At these deliberations the sharp friction of opinion, the acumen displayed, and the learning brought to bear in the discussions must have seemed surprising to that portion of the world which regards the matter without interest, or is absolutely ignorant of its name and existence. A little further account of this movement may not be out of place, here.

Some twenty years ago, congresses for the promotion of social science began to be held annually, either in England or on the Continent. The subject of General Average formed a part of the *agenda* of these meetings. Indeed, the section devoted to it became latterly so prominent that it attracted the largest and most important audiences. Average was subsequently constituted a separate, affiliated congress ; holding its meetings in the same place, and contemporaneously with the general assemblage. Still later it became united with the peripatetic body which named itself the Association

for the Reform and Codification of International Law : and, again, at the meetings of this body in the various capitals of Europe, the Adjusters' chamber was usually thronged with a large and enlightened concourse. On the occasion of the Social Science Congress being held at York, in the summer of 1864, the General Average section decided on the adoption of certain rules of guidance. These were few in number and were somewhat tentative in character, but they became the groundwork of a firmer and more decided agreement arrived at at the Antwerp Congress, held in 1877, where representatives from most maritime countries, including the United States, were present. The final determinations of the conclave were embodied in a document, and became henceforth known as the York-Antwerp Rules. It was the great object of that meeting to produce an international code of regulations, applying in its action to every part of the civilised world. This was a rather grand design ; and a little consideration shows that it was an impracticable one. Some nations possessed organic codes ; others adhered very strongly to their own systems, which they deemed to be established on logical principles. The former could not be altered except by legislature, or the solemn decisions of courts of law ; the latter were part of a commercial creed, and which only a great revulsion of views could alter.

Then the practical questions arose, how far is concession possible ; and to what extent can governments be severally acted on to produce, if not unity, at least a large measure of conformity.

Where codes existed, no private concessions would be of value; and as to legislation, all that was within the competence of the Congress was to depute each delegate on his return to try to discover the means of acting on his particular government. It does not appear, as yet, that much success has attended that mandate; and the questions propounded remain for the most part unanswered.

The York-Antwerp Rules have no legal binding sanction; but they are admitted to be wise, and they form a step of approach from our own insular views and methods towards most European systems and that of the United States. They are frequently introduced into charter-parties and bills of lading, so forming part of the contract, and they are often included among the clauses of the policy of marine insurance. In connection with concession we might quote two of the more recent cases tried, those of *Attwood v. Sellar*, and *Svendson v. Wallis*, hereafter mentioned, as tending in that direction, namely, of abandoning an old and wide-spread English custom, for a foreign but more reasonable view. Up to the present, all concessions must be admitted to have come from ourselves.

Here, too, will be the fitting place to speak of another important endeavour, commenced during the last few years. In 1871, the first step was taken for forming the Average-Adjusters of England into an Association: London was to be its seat; and the object proposed was to obtain, as far as possible, unity of ideas, to assimilate practice, and to produce rules for general use, which

could not be departed from without subjecting the member or associate of the Society who broke the rules to some disabilities for his deviation. These rules, as far as they could be fixed on, and as far as they were in conformity with, or did not conflict with, known law, were, after sufficient deliberation, formulated.

An Annual Meeting of Adjusters practising in England and Scotland affords the opportunity of reconsidering the rules and revising them, if found necessary. Though not under charter, this Association has gained a considerable position and power. Its members and associates use a special seal; and at the yearly assembly of the profession, the members who attend, being augmented by the presence of honorary and representative members, various interesting topics are debated, and the decisions of Courts of law relating to Insurance and Average delivered during the preceding twelve months are passed in review, and are recorded in the Annual Report. It was thought that admission to a body constructed in this form would be a useful means of education for those who should afterwards be entrusted with the adjustment of Averages.

We have already said, that the last ten or twelve years have been unusually fruitful in legal decisions on our subject. The frontier of the law has been pushed forward in this direction. Yet, as greater the circle of light, so, ever increases the circle of darkness, our promising array of judgments has produced some unsettledness, and sown the seeds of fresh issues; and decisions, intended for finality, have been made the stepping-stones for new departures.

On more than one recent occasion the Bench has intimated that professional Adjusters do not always adhere to law ; and the latter have even received a mild reproach that they prefer to follow their own custom instead of making their practice conform to the law of England.* If this be so, the Adjusters are much to blame. But as to any conflict between custom and law, if there be one at all, it can be but momentary ; for when a custom is in question, if it is declared to be in conformity with the law, immediately practice becomes law and not custom : and if it is ruled that the custom is opposed to law, at that instant the custom dies, and specific law takes its place. All Adjusters will agree to the position here laid down, and will follow, without questioning, the law when it becomes known to them. There is, however, an office to be exercised by those whose occupation is the regulation of Averages. They find it impossible to adduce or reconcile law to every case and new situation, which varying combinations of circumstances produce. When the rule of law cannot be found for the occasion, the practice of Adjusters must be guided by custom ;—not “their custom,” but the accepted customs of the country, the locality, or the trade. Adjusters may, indeed, in the absence of express legal sanctions, exercise themselves in making “clever guesses at law,” or acting on the *cy pres* principle ; but beyond this, safety can only be had in following the general and prevailing custom applying to the case, or most nearly approaching it.

* See notably the judge's remarks in the case of *Stewart v. West India and Pacific Steamship Co.*, L. R. 8 Q. B. 88, affirmed Q. B. 362.

This difficulty does not stop with the Adjusters, Bench and Bar have sometimes to deal with "cases of first impression;" and to acknowledge that by-ways and field paths have yet to be made before every new or isolated case may be reached, and justice be done therein. The occasion for hesitancy at times, has been candidly avowed by high authority. Justice Denman, in a recent cause,* expressed himself in the following distinct and rather remarkable words:—"Now-a-days, no Judge can feel very confident on a point of law; so many decisions are reversed, that perhaps the more confident any one feels, the more he ought to distrust himself."

Speaking of what may be called new law made during the period we are reviewing, it may be said, that its tendency is to give consistency to practice; and to bridge over the gap that separates English law and custom from the codes and customs of other European countries and of the United States. To have a collection of laws relating to General Average consented to by all Maritime Nations is very desirable, but it remains an object unattained as yet. Ships are cosmopolitan in their occupation, carrying cargoes of merchandise to "all ports and places," in every country which possesses a coast; and often having occasion to adjust, in any port of discharge, and collect the contributions of the joint adventurers in the voyage, wherever the termination of that voyage may be. It is very inconvenient for a ship-master, and those whose interests he represents at a

* *Holland & Co. v. Veuve Pommery et fils, Nisi Prius*, 18th May, 1881.

foreign port, to find himself under a code or custom unknown to him, the action of which, however, affects his owners and, possibly, their underwriters.

The changes in our own customs, often slow, and sometimes imperceptible in their advance; new and more definite decisions, and occasional reversals of law; these together with fresh subject-matter coming under insurance; new modes of insuring, new methods of water-carriage, and novel dangers in navigation,—these are the incidents which in the course of a few years render text and hand-books antiquated, and call, from time to time, for new editions. The production of such recensions is an expensive but a necessary labour. C. C. Cotton remarks, that during the French Revolution the Bust-makers lost money. The rise and fall of its celebrities was so rapid, that before a plaster cast was dry, the hero's head had fallen under the knife of the guillotine, and the bust had to be thrown aside.

Similar, but not quite so sudden are the changes a writer has to observe and record; and the fact of this volume having been out of print for a considerable time renders a re-issue more desirable.

A good deal of new matter has been, of necessity, added to the text; and some appendices found in the previous edition are now omitted, it being the writer's desire not greatly to increase the bulk of the volume, but still to entitle his *Enchiridion* to the name first assumed, a *Handbook* to the subject of which it treats, and it is hoped, a useful one.

A condensed account will be found in these pages,

gathered from the Abstract of Sea Casualties returned to the Board of Trade, of the losses, collisions and minor disasters of British and Foreign Shipping, during the twelve months ending on the 30th of June, 1882. These statistics will show the gigantic proportions of commerce in the nineteenth century committed to fortune on the Ocean, together with its share of destruction and sinister accidents.

LONDON, *April*, 1884.

TABLE OF CONTENTS.

—♦—

TABLE OF CASES	xix
ADDENDA	xxiii

PART I.

MEANING OF THE WORD AVERAGE. ITS ORIGIN.

Division of the Subject into—

- I. General Average.
- II. Special Charges.
- III. Repairs of a Ship.
- IV. Damage to Merchandise, or Particular Average.
- V. Loss of Freight.
- VI. Partial Loss of Goods.
- VII. Salvage Loss of Ship and Goods.
- VIII. Constructive Total Loss.
- IX. Absolute Total Loss.

GENERAL AVERAGE.

Definition.

Jettison : the germ and type of General Average.

Sacrifices and Expenses.

Questionable Subjects of General Average.

Of proximate and remote causes of Sacrifice and Expense.

SPECIAL CHARGES.

MEANS OF RAISING MONEY TO PAY AVERAGE DISBURSEMENTS.

OF BOTTOMRY AND RESPONDENTIA BONDS.

THE CONTRIBUTORIES TO GENERAL AVERAGE.

UNDERWRITER'S LIABILITY ON FOREIGN ADJUSTMENTS.

PART II.

OF AVERAGE CONNECTED WITH INSURANCE.

Effects of Insurance on Commerce.

In what sense the Policy of Insurance is a Contract of
Indemnity.

The Marine Policy described.

Common Form of Policy, at large.

PARTICULAR AVERAGE ON SHIPS.

Stranding.

Collision.

PART III.

OF CLAIMS ON GOODS.

Total Loss of Part.

Loss with Salvage.

Particular Average.

OF CLAIMS ON FREIGHT.

PART IV.

OF TOTAL LOSS.

Loss of Ship.

Abandonment.

Barratry.

OF THE SHIP MASTER'S POSITION AND DUTIES.

CONSTRUCTIVE TOTAL LOSS.

Of Ship.

Of Goods.

Of Profits and Commission.

OF SEAWORTHINESS.

PART V.

OF PROCEEDINGS IN CASES OF AVERAGE.

OF FRAUDULENT CLAIMS.

PART VI.

OF CLAIMS ON MUTUAL INSURANCE ASSOCIATIONS, OR CLUBS.

PART VII.

OF ARBITRATION.

APPENDICES.

—◆—
APPENDIX I.

OPINIONS GIVEN BY COUNSEL ON THE SUBJECT OF COALS CONSUMED
TO ASSIST A STRANDED VESSEL OFF THE GROUND.

APPENDIX II.

STATISTICS OF BRITISH SHIPPING ; LOSSES AT SEA ; AND LOSSES AND
SAVING OF LIFE.

INDEX.

TABLE OF CASES.

ACHARD v. Ring, 215	Chartered Mercantile Bank of India
Aitcheson v. Lohre, 28, 72, <i>note</i> ; 182, 198, 386	v. Netherlands Steam Navigation Co., 241, 249
Allen v. Sugrue, 372	Corcoran v. Gurney, 233
Anderson v. Geldert, 420	Corry v. Coulthard, 44
Anning v. Hartley, 552, 570	Cory v. Burr, 67, 404, 439, 440
Arthur v. Barton, 124, 422	Crofts v. Marshall, 319
Attwood v. Sellar, 19, <i>note</i> ; 92, 93, 111, 146, <i>note</i> ; 164, 340, <i>note</i>	Crooks v. Allan, 14, 141
Aubert v. Gray, 513	Cunard v. Hyde, 52
Avery v. Bowden, 419	
	DA COSTA v. Edmonds, 53, 54
BAINBRIDGE v. Neilson, 355	Dalby v. India and London Life Assurance Co., 177, <i>note</i>
Baker v. Stevens, 566	Dalglish v. Davidson, 133
Barber v. Fleming, 149	Davidson v. Burnand, 428
Barker v. McAndrew, 149	Delcomyn Badart and Brooks, 539, <i>note</i> ; 543, 570
Bell v. Postlethwaite, 554	Dickenson v. Jardine, 61, 255
Birrell v. Dryer. <i>See</i> ADDENDA.	Dudgeon v. Pembroke, 487, <i>note</i> ; 490
Bishop v. Pentland, 230	Duff v. McKenzie, 271, 272, 432
Blackett v. Royal Exchange Assur- ance, 203	Dunbar v. Smurthwaite, 483
Blyth v. Lafone, 534, <i>note</i>	Duncan v. Benson, 133
Booth v. Gair, 380, 381, 384, 471	Duncan v. Koster, 406
Boudrett v. Hentig, 67	
Broomfield v. Southern Insurance Co., 125, 134, 153	ENTWISTLE v. Ellis, 264, 271, 272
Bruce v. Nicopulo, 149	
Burnand v. Rodocanachi, 365	FAWOUS v. Sarsfield, 442, 479, 488
Burton and Co. v. English and Co., 40, <i>note</i> ; 55, 58, <i>note</i> ; 186, <i>note</i>	Frazer and Co. v. Ehrensperger and Co., 571
	Fryer v. Shaw, 570
CAMMELL v. Sewell, 354	
Case v. Davidson, 360, 362, <i>note</i>	GAMBLES v. Ocean Marine Co., 398
Castellain v. Preston, 182	

- Gardiner v. Salvador, 467
 Gibbs v. Grey, 423, *note*
 Gibson v. Small, 442, 487, 488
 Glaisher, *ex parte*, 533
 Good v. London Steamship Owners Indemnity Co., 428
 Goodson v. Brooke, 532
 Goss v. Wither, 466
 Gould v. Oliver, 53, 54
 Great Indian Peninsular v. Saunders, 380
 Green v. Young, 438, 440
 Groer v. Poole, 153, 158, *note*; 166
 Grill v. General Screw Collier Co., 401, 411

 HALHEAD v. Young, 475, 478
 Hall v. Janson, 154, 163, 347
 Harris v. Scaramanga, 142
 Harrison v. Bank of Australasia, 104
 Harrison v. Universal Insurance Co., 206, 207
 Hartloy v. Ponsonby, 422, *note*
 Heydorn v. Bibby, 135, 221
 Hoquard v. The Queen, 435
 Hodgkinson v. Fernie, 570
 Hodgson v. Blackiston, 355
 Hogg v. Burgess, 570
 Holdsworth v. Wise, 436
 Houstman v. Thornton, 351
 Hudson v. Harrison, 396
 Hutchison v. Hayward, 531

 INGRAM v. Harrison, 431
 Inman Steam Co. v. Bischoff, 67
 Ionides v. Universal Marine Insurance Co., 490
 Irving v. Manning, 177, *note*

 JB v. Langton, 117
 Johnson v. Chapman, 42, 43, 52
 Johnson v. Hogg, 440
 Johnson v. Shedden, 299
 Jones v. Nicholson, 403

 KALTENBACH v. Mackenzie, 369, *note*
 Kemp v. Halliday, 375
 Kendil v. Merrett, 554, *note*
 Kidstone v. Empire Insurance Co., 384, 389, 423
 Kingsford v. Marshall, 233

 LEWIN v. Suasso, 400
 Lewis v. Rucker, 297, 300
 Lidgett v. Secretan, 397
 Lohre v. Aitcheson, 28
 Lozano v. Janson, 435

 MCCARTHY v. Abel, 360
 Macculloch v. Owners of "Sir John Moore," 48
 McDougle v. Royal Exchange Assurance, 228, *note*
 McSwiney v. Royal Exchange Assurance, 476
 Maisack v. Webber, 562
 Meyer v. Ralli, 372, 381, 384, 386, 472
 Miller v. Titherington, 16, 17, 54
 Miller v. Woodfall, 362, *note*; 364
 Milward v. Hibbert, 39, 53
 Montoya v. London Assurance, 67, 315
 Moran v. Jones, 115
 Mordue v. Palmer, 570
 Morwitz v. Wood, 55

 NAYLOR v. Palmer, 435
 Nesbitt v. Lushington, 439
 Newman v. Cazalet, 170

 OCEAN STEAM Co. v. Anderson, Tritton, & Co., 92

- Oppenheim v. Fry, 254
 Organ v. Brodie, 422

 PARMETER v. Todhunter, 393
 Phillips v. Nairne, 470
 Pickering v. Cape Town Rail & Dock Co., 542, *note*; 564
 Pickup v. Thames Insurance Co., 487, *note*
 Pirie v. Middle Dock Co., 85, 86, 287, 346
 Pitman v. Universal Insurance Co., 29, 199, 458
 Pole v. Fitzgerald, 355
 Potter v. Rankin, 375
 Powell v. Wise, 437
 Power v. Whitmore, 170
 Prehn v. Bailey, 101, 429

 RALLI v. Janson, 270, 271, 272, 433
 Rankin (in error) v. Potter (in error), 149
 Rayner v. Goodmond, 230
 Roberts v. Eberhardt, 571
 Rodoconachi v. Elliott, 440
 Ross v. Thwaites, 53
 Rotch v. Edie, 440
 Roux v. Salvador, 275, 373, 379, 432, 479

 SCARAMANGA v. Stamp, 407
 Schmidt v. Royal Mail Steamship Co., 85, 215
 Scott v. Avery, 534, 555, 567
 Scottish Marine Co. v. Turner, 360
 Sea Insurance Co. v. Haddon, 364, and ADDENDA.
 Sharpe v. Gladstone, 360
 Shepherd v. Kottgen, 46, 47

 Shepherd v. Henderson, 369
 Sieveking v. Maas, 419
 Simeon v. Bazett, 478
 Simmonds v. White, 141
 Small v. Gibson, 487
 Smith and others v. Robinows, &c., 160, 171
 Smith v. Robertson, 359
 Stewart v. West India & Pacific Steamship Co., 85, 215
 Svendsen v. Wallace Brothers, 19, *note*; 94, 111, 146, *note*; 164, 340, *note*; and ADDENDA.

 TELEFSEN v. Owners of the *Cito*, 391
 Tharsis Sulphur Co. v. Loftus, 571
 Thelusson v. Fletcher, 393
 Thompson v. Colvin, 469
 Thompson v. Gillespie, 483
 Thompson v. Hopper, 109, 442, 487, 488, 490
 Thompson v. Whitmore, 229
 Todd v. Ritchie, 401
 Touteng v. Hubbard, 440
 Tronson v. Dent, 418—471
 Tryer v. Shaw, 551
 Turnbull v. Woolfe, 512

 VLIERBOOM v. Chapman, 287

 WALPOLE v. Ewer, 170
 Walthew v. Mavrojani, 117, *note*; 118
 West India and Panama Telegraph Co. v. Home and Colonial Insurance Co., 428
 Whitecross Wire & Iron Co. v. Savill, 85, 215, *note*; 260
 Whitwell v. Harrison, 397

Wilkinson v. Hyde, 264, 267, 271, 272, 433, 471, <i>note</i>	Wright v. Marwood, 40
Wilkinson v. Wilson, 422	
Wilson v. Bank of Victoria, 76	XENOS v. Fox, 513
Wilson v. Rankin, 408	
Wolfe & Crossley v. European Steam Co., 530	
Woodley v. Mitchell, 249	YGLESIAS v. Micklereid, 55

CASES BY NAME OF VESSEL, ETC.

The Argo, 429	Mouse's Case, 60
The Atjeh, 241	The Newport, 435
The 'Bacon-Case,' 380	The Nyanza, 78; and APPENDIX, No. 1.
The Bombay, 380, 384, 391	The Plantagenet, 391
The Broxbornebury, 459	The Sappho, 92
The Commerce, 253	The Sebastopol, 389
The Crown Prince, 241	The Sir Robert Peel, 439
The Fusileer, 63, 150, 151	The Snowdon, 117
The Gaetano and Maria, 128, <i>note</i>	The Soblomstrom, 286
The Galam, 286	The Southern Belle, 117, <i>note</i>
The Iris, 539, <i>note</i>	The Teutonia, 406
The James Watt, 253.	The Tribune, 115
The John, 416, <i>note</i>	The Troubadour, 40
The Kensington, 207, 208	
The Maria Jane, 92	

ACTS OF PARLIAMENT.

Customs Consolidation Act, 1853, 37, *note*
Merchant Shipping Acts and Amendments, 37, 38, 50, 409, 425, *note*.

ADDENDA.

Too late for insertion in the text, the following cases of importance require to be registered.

The first, *The Sea Insurance Company v. Haddon and Another* was decided in the Court of Appeal on the 13th of March, 1884, the Court composed of the Master of the Rolls and the Lords Justices Baggallay and Lindley. The plaintiffs had insured the body of the *Queen of the East*; the vessel was in collision with the *Cassandra*, and was so much injured that she was abandoned to the insurers, who paid as for a total loss; they then claimed the chartered freight of the *Queen of the East* which was lost, and for which the Court of Admiralty allowed a sum of £1,055. The case was tried before Mr. Justice Day, at Liverpool, who decided against the plaintiff's claim; the House of Lords has affirmed Justice Day's decision.

This judgment will perhaps be considered definitive in similar cases where the abandonee of a ship claims pending freight.

The second case to be mentioned, *Birrell v. Dryer*, concerns warranties barring certain localities and seasons. The policy contained the proviso or warranty "No St. Lawrence." The vessel insured, the *Chipman*, was lost in the Gulf of St. Lawrence. The Lord Ordinary (Scotland) held that both river and gulf were barred, and that the assured could not recover. Three judges out of five, in the Second Court, held the contrary view. The cause came before the House of Lords on the 17th March, 1884, and they upheld the Lord Ordinary's decision, that the assured could not recover.

The cause of *Svendson v. Wallace Brothers* had been looked forward to as deciding the question of reloading in, and exit charges from, a port of distress or repair, and it was supposed it would have been the completion of the positions left untouched by the case of *Attwood v. Sellar*. The plaintiff's vessel had gone into a port on account of damage, not general average in its character, and the questions

between the shipowner and the receiver of cargo related to the points mentioned above. Justice Lopes had ruled that the outward expenses were of the nature of general average, following *Attwood v. Sellar*. The merchants appealed, and the appeal was heard on the last day of term (9th April, 1884.) The Master of the Rolls and Lord Justice Bowen agreed in holding that these charges were not general. Lord Justice Baggallay's judgment was opposed to the two Judges. Thus four Judges are divided, two and two ; and permission was given by the Court that the case should go to the House of Lords. So no change of practice takes place at present from what was decided in *Attwood v. Sellar*. The decision in this appeal, if it had stood, must have been incomplete or unsatisfactory, as it would not have dealt with the store rent of cargo discharged, which the foreign shipowner admitted was general average,—a point which would still have remained for future debate.

A

HANDBOOK OF AVERAGE.

PART THE FIRST.

WHAT AVERAGE IS.

IN common parlance, the word *Average* is synonymous with *mean* or *medium*. It expresses a common rate or quantity, such as is derived from the division of numerators by a common denominator. It has the same significance whether used as an adjective or a noun. Thus we speak of the mean time occupied, or the average time; a medium price, or an average price; the mean of several observations; the average of several years.

When used in reference to maritime commerce the word has a technical, and yet an analogous, meaning. It still expresses division, but it adds the idea of *contribution* to that of a common ratio or result. It always implies the incidence of a distributed burthen, of a weight to be shared equally or proportionably by several bearers. A simple illustration of the principle, taken from material objects, is that of a long ladder carried by several men. It will be found that in the employment of the word *Average* there is never omitted

its connection with division and burthen. Thus whilst in ordinary and in scientific language the word indicates the resultant of several measurements or rates blended together, in commercial and legal speech it adds the second idea, that of a division of something uniform, and its distribution as a burthen upon associated individuals who are jointly liable to bear such burthen.

The manner in which the term Average is applied by speakers, whether in its colloquial or its technical sense, leaves no doubt as to the meaning intended. For example, when *Corn-Averages* are spoken of, what is meant is a common value of each kind of corn deduced from many prices; but when an *Average on Corn* is mentioned it is at once known to mean a claim on the insurers of the grain, whether for loss or damage of the article itself, or for its contribution to some joint expenses incurred under circumstances to be hereafter described.

It will have also to be explained how two such different forms of claim as those just mentioned, namely, loss or deterioration of the thing insured, and the contribution of the article to some common sacrifice or to expenses incurred, can rank under one name; and it will be shown that this is accomplished by the addition of two prefixes, and that *General Average* and *Particular Average* are for all purposes sufficiently distinguished; yet they are not alien to one another, because of the common bond which is between them, that of division and incidence of burthen—the removal of a weight from an individual and distributing it among many. In General Average the burthen is

borne by all the co-adventurers, shipowner and cargo owners; in Particular Average it is borne by the insurers, each of whom bears his share of loss sustained by an individual, the assured.

The origin of the word Average is curious, and its etymology is interesting, especially as more than one parentage is assigned to the term. Various accounts and guesses have been made concerning it. Slightly varied according to the genius of European languages, there is a general agreement, and the same word has been adopted among all of them to express marine losses. The name is in

English, *Average*.

French, *Avarie*.

Dutch, *Averij*.

German, *Avarie*.

Danish, *Haverie*.

Norwegian, *Haverie*.

Swedish, *Hafverie*.

Spanish, *Avaria*.

Portuguese, *Avaria*.

Russian, *Abareia*.

The following pedigree of the word appears to myself the most probable. From the Greek noun *βάρος*, *a burthen*, is derived the adjective *βαρὺς*, *heavy, weighty*; also, with the privative affix, the corresponding negative *ἀβαρὴς*, *not burthened*; metaphorically, *not burthensome*. By the substituted *v* for the Greek *β*, in Latin and English, we arrive directly at the word *avares*, which nearly approaches the form presented in modern European languages. It may be objected that we possess few Greek etymons, and that we receive Hellenic roots chiefly through the Latin medium; consequently, we must seek in the Roman language a nearer link. We therefore take the verb *averro*, to *carry or bear away*, which by an allowable metaphor we read *to lighten*. From it we trace the low-Latin verb *averare*; and thence

the more spurious noun *averagium*, authorised by Sir H. Spelman.

It is a question whether the word had not been adopted very early into the Teutonic family of languages ; and looking into an old English dictionary, a number of words are found having the same radical. Thus we have, on the authority of Doomsday Book, *avera*, a *ploughman's day's work* (his proper quota) ; also we find *aver*, *wealth* (*conf.* French *avoir*), and also the meaning *a beast of burthen*. More important is the thoroughly Saxon-English word *aver-penny*, *money contributed towards the king's averages or carriages, to be freed from that charge*. Here *average* and *carriage* are used as synonyms. Then we have *average* itself, an agricultural word, meaning *the breaking up of corn-fields* ; also *averia*, *plough-cattle* ; and, as a last instance, *aver-corn*, *rent paid in corn to religious houses*.

The late Mr. Rawdon Brown wrote me from Venice, requesting that the Venetian etymology of the term might be added to what is above quoted from other nations. He remarks that "*averi* signified *goods* ; and that *averi di peso*, *heavy goods*, can alone account for the French term *avoir du poids*. In like manner *average* was a tax on goods."

Through all these words runs the idea of burthen ; and we may say, then, that even if the exact parentage of the name have not been quite satisfactorily made out, *Average*, unquestionably, conveys the idea of division of burthen,—in commerce framing itself as distribution of expense. It is the bearing of some onus, as has been already said, by several persons, similarly to a heavy weight carried by a number of men. The signi-

fication of the term corresponds with what we now call General Average.

Thus much for the name itself. The word *Average* makes its appearance pretty early in European commerce; and it finds its way into that ancient document the Bill of Lading, where it signifies a small contribution from all the proprietors of merchandise on board a vessel, to be given to the master as an encouragement for taking care of their goods. Such a stipulation, it is true, is not now enforced in this country, the captain receiving "primage," "hat-money," or a "gratuity," as his compensation; but the word has not been struck out of the bill of lading, and the meaning above given is not very remote from its original intention, as will be shown. Its present retention is only erroneously supposed to be an engagement to pay General Average.

The Average of the bill of lading, earlier in use than General Average, was, it is repeated, a contribution made by the merchants who had goods on board a vessel to the captain or owner towards payments or expenses incurred by him for the successful prosecution of the voyage, and the landing and bringing safely to the place of sale the goods under his charge destined thereto. These expenses varied, and were not a fixed quantity. They consisted of presents made to kings and other potentates, probably also black-mail paid to escape pirates and rovers, who infested the seas in the early days of commerce, with other payments, open or concealed; and the word also included sacrifices, such as jettison. But they were paid only by the merchants in respect of their goods, and not by the ship. They formed, consequently,

a *special* contribution—*General Average* being a contribution made by the ship and freight as well as the goods of her lading.

Light has been thrown on this subject by the valuable addition to our commercial literature presented by the late Mr. Rawdon Brown in his volumes of Venetian State Papers relating to trade with England, published under direction of the Master of the Rolls, and of which I gladly availed myself in preparing my “Manual of Marine Insurance,” for much interesting information on that subject.

The earliest notice of Average I find in these documents is under the year 1406, when it is recorded, “A present of sixty ducats for Dino de Rapundis is to be paid by Average on the merchandise of the Flanders Galleys.” In 1408 there is a decree of the Venetian Senate authorising an expenditure of 200 golden ducats for presents to the King of England and the Duke of Burgundy, to be paid by Average on goods by the Flanders Galleys. This was, probably, for safe conduct. And thenceforward frequent mention is made in these papers, under different years, of this method of refunding similar beneficial expenses.

In 1438 there is a missive from the Venetian Senate to the Vice-Captain of the London Galleys, Ser Lorenzo Moro, concerning an Average of 240 ducats for goods which he had been compelled to throw overboard.

The foregoing passages show the use of the word Average in the earlier European commerce; and the last extract connects it with jettison, which we look upon as the original subject of general contribution;

but in the Venetian annals the ship and freight appear not to have been called upon to bear any share of the burthen.

When, however, as under the present commercial systems of all civilised nations, contribution is made by all the associated interests in a sea adventure for some sacrifice or expense made for the common benefit, such contribution bears the name, known to every one engaged in mercantile pursuits, of General Average.

With the introduction of marine insurance, the name of Average became applicable to all kinds of claim which might be made on a policy insuring ship, merchandise, freight, or other interests; because the first insurances were effected with separate assurers, who signed their names at the foot of a single document, and were in consequence called "under-writers." This was long before the foundation of the first insurance companies—the earliest being the Royal Exchange Assurance and the London Assurance, both corporations dating from the year 1723. The loss or claim, of whatever nature, falling on a policy, was divided among, and borne by the several underwriters, in proportion to the respective sums they had subscribed. Such claims and payments were *averaged* on the underwriters, and received the really scientific name of Particular Average—*Average* because of their burthen and distribution; *particular*, as falling upon a special interest, instead of being incident on all the interests engaged together in a marine adventure. The French *Code de Commerce* thus authoritatively defines Average: "Toutes dépenses extraordinaires faites pour le navire et les marchandises conjointement ou séparément; tout dommage qui

arrive au navire et aux marchandises, depuis leur chargement et départ, jusqu'à leur retour et déchargement, sont réputés Avaries."—Titre XI., Art. 397. All extraordinary expenditures made for the ship and the goods, either conjointly or separately; all damage which happens to the ship and to the goods, from their loading and departure till their return and discharge, are reputed *Averages*.

A great deal of learning concerning the term Average, some of it curious, has been lately collected in Mr. Skeat's Etymological Dictionary, Part I.; 1879. At the expense of repeating some things said in the text above, I borrow entire the results of this writer's diligent and interesting research.

"'Average.' A proportionate amount—an amount estimated as a mean proportion of a number of different amounts. Developed out of an older and original meaning, viz., a proportionate contribution rendered by a tenant to the lord of the manor, for the service of carrying wheat, turf, &c. It was used originally solely with reference to the employment of horses and carts. Later, it meant a charge for carriage, according to the weight and trouble taken. Richardson quotes Spelman, that Average meant a portion of work done by working beasts (*averiis*). His odd translation of *averiis* by working beasts, is due to an old notion of connecting the low Latin *averium* with the Latin *opera* work(s). *Average* is not in early use in English literature. Used in Ad. Smith's Wealth of Nat. bk. I. c. 5. In Blount's Law Dict. A.D. 1691, we find Average (Lat. *Averagium* from *averia*, i.e. cattle) signifies service which the tenant owes the king or other lord, by horse or ox or by carriage with either; for in ancient charters of privileges we

find *quietum esse de averagiis*. In the Register of the Abbey of Peterborough (in Bib. Cotton) it is thus explicated: '*Averagium, hoc est quod nativi deberent ex antiqua servitute, ducere bladum (to carry wheat) annuatim per unum diem de Pillesgate apud Burgum, vel carriare turbas (to carry turf) de marisco ad manerium de Pillesgate cum carectis et equis suis: Anno 32 Hen. VIII. c. 14, and 1 Jac. cap. 32.*' He adds, 'It is used for a contribution that merchants and others do proportionably make towards their losses who have their goods cast into the sea for the safeguard of the ship or of the goods and lives of them in time of tempest; and it is so called because it is proportioned after the rate of every man's *average*, or goods carried. In this last sense, it is also used in the statute 14 Car. 2, cap. 27.' The development of senses is easy; viz. (1) A contribution towards loss of things carried—Low Latin: *Averagium*, '*vectoræ onus quod tenens domino exsolvit cum averiis, seu bobus, equis, plaustis et curribus*; (2) *detrimentum quod in vectura mercibus accidit. His adduntur vectoræ sumptus et necessariae aliæ impensæ*. Ducange—Low Lat. *Averium*, *omnia quæ quis possidet*. F. *Avoir*, *fortune*, (1) *pecunia*; (2) *equi, oves, jumentu, ceteraque animalia quæ agriculturæ inserviunt*, &c. Ducange—O. F. *Aver*, also *Avoir*, (1) to have; (2) as sb. goods, possessions, cattle (for in this case the low Lat. *averium* is nothing but the O. F. *aver* turned into a Latin word, with the suffix *ium* added, to make it a neuter collective substantive. The Low Lat. *averium* was also spelt *avere* and *aver*, in accordance with the French. Also note that the O. F. was so particularly used of horses that a horse was called an *aver*; and we even find in

Burns, in a poem called 'A Dream,' st. 11, the lines, 'Yet aft a ragged cowlt's been known to mak a noble *aiver*.' See *Aiver* in Jamieson's Scot. Dict.; and see *Aver*, *Aver-corn*, *Averland*, *Average*, *Aver-penny*, in Halliwell's Dict. It is surprising that the extremely simple etymology of *average* is wrongly given by Wedgwood, after a correct explanation of *Aver*, and a reference to one of the right senses of *Average*; also by Mahn (in Webster's Dict.), who, after correctly referring to *Aver-penny*, actually cites the verb to *avér*, to affirm to be true; and by Richardson, who refers to the F. *œuvre*, a work. The very simplicity of the explanation seems hitherto to have secured its rejection; but quite unnecessarily. An *aver-age* was estimated according to the 'work done by *avers*,' *i.e.*, cart-horses; and extended to carriage of goods by ships."

In a supplement to his Dictionary, Mr. Skeat again returns to the word. But it should be observed, what it is not expected the author should know, that the "Average" referred to is not General Average, but has a specific though cognate use. This use is explained in my text.

"'And ouer that; to pai or doo pay (cause to be paid) all manner *auerays* as well for Burdeux as for Thames:' *i.e.* (as I suppose) to pay all customs or dues [on certain wines] both at Bordeaux (where the wines were shipped) and at the quays on the Thames (where they were unshipped). This is from Arnold's Chron. (about 1502) Ed. 1811, p. 112; and again at p. 180, we have mention of the king's 'custumes, or subsidyes, or *auerage*.'"

Average, the breaking of corn - fields. Eddish, Roughings.

Average (in traffic), a certain allowance out of the freight to a master of a ship when he suffers damage; a contribution by insurers to make satisfaction for insured goods thrown overboard.

Averia, cattle, oxen, or horses used for the plough.

Averiis, &c., a writ for seizing cattle, &c.

Whether it is desirable to retain one generic name, where the several species of claim embraced by it have become so individualised and have such distinct characteristics, need not here detain us. The word *Average* is known throughout the world, and we therefore accept it in the sense in which it is ordinarily used, and proceed to see into what heads the word divides itself. These are,—

First—General Average.

Secondly—Those charges and expenses which arise when a laden vessel puts into a port of distress, and which can be applied specifically to each of the interests—ship, cargo, and freight; frequently called Particular or Special Charges.

Thirdly—The repairs of a ship rendered necessary by perils of the seas.

Fourthly—Damages to merchandise by sea perils, including fire, plunder, &c.

Fifthly—Loss of freight, by the decrease in quantity of the merchandise carried, by means of sea perils.

Sixthly—Partial loss of goods necessarily sold at an intermediate port, owing to sea perils.

Seventhly—Salvage loss of ship or of goods, recovered in part or in a deteriorated state, after being sunk, burnt, &c.

Eighthly—The constructive total loss of ship, goods, or freight.

Ninthly—The absolute loss or destruction of ship, goods, or freight.

The last head is usually distinguished by lawyers from what they term “an Average Loss;” but on the grounds given above it is entitled to the same name as the rest.

We shall now consider these several subjects, one by one, in the order established above. As we proceed we shall probably find exceptional cases where custom, though long prevalent, strikes us as being inconsistent with equity and even with reason in its mode of dealing. We shall pause to point out such discrepancies, and take the liberty of offering suggestions for the adoption of a more uniform and rational practice. Those readers who do not care to enter into discussions about what they consider the niceties of the subject, but only desire to gain a general insight of the system as it stands at present, can pass over these passages. Others, more addicted to investigation and reflection, will be interested in such discussions. If order and congruity are the character of their minds, these latter persons may be disturbed by customs or decisions contrary to their notions of consistent justice. They may sometimes even fancy that they have lost the clue which was to guide them out of the labyrinth of conflicting interests; and they may be ready to find fault with a system which does not seem scientifically exact. But *good faith* and *plain common sense* are the two lamps which will certainly lead by their use to right conclusions.

We believe that on the whole, making necessary allowance for imperfections which will adhere to all systems, substantial right is done by the present English system of Average. There are some exceptional instances which we shall hereafter remark, where, from expediency or prescription, the consistent rule seems pushed aside. There may be also a few cases where, from private interests, attempts are made to supersede or mystify the established regulations. These ought to be strenuously resisted. But we repeat that, amongst seeming contradictions, the deductions hitherto arrived at by the exercise of good common sense and good faith will be found, in the immense majority of instances, the correct ones.*

GENERAL AVERAGE.

Description.

General Average means a contribution according to value, made by the associated interests which form a marine adventure. These are the ship itself; the merchandise she carries; and the freight she earns. The persons to whom these several interests belong are sometimes called the Co-adventurers. They are not partners for other purposes; nor is there, even

* The remarks in the preceding paragraph are unaltered from the former editions; but what is said in the preface may be repeated here, that the alterations now becoming in the system, tend to simplicity, and to a conformity with the views of other maritime nations. We quite agree, however, with an old writer, that "all sudden changes, though for the better, have a kind of trouble attending them." The allusions in the text were much directed to the incidence of charges on freight. This discrepancy is already mitigated, and will probably disappear within a short period.

ad hoc, the solidarity as of a partnership among them, such as would prevent one co-adventurer bringing an action at common-law against another, or the others. So far the contrary, that it was and is held that each co-adventurer whose interest in the adventure had been sacrificed, can, if necessary, draw up a statement of General Contribution, and claim from all the other adventurers in the voyage their quotas of such loss or expense. Nor, probably, does *Schmidt v. Royal Mail Steamship Co.** take away this right; it rather gives an additional enforceable recourse by the suffering party or parties against the shipowner, as a centre of proceeding, to insist on his adjusting all the claims arising on the voyage in one statement, and pay and receive, as the case may be, to or from all the parties, himself included. The object of this contribution is the repayment of some expense incurred, or the restitution of something valuable sacrificed, for the benefit of the whole. This definition of a very reasonable principle being kept in view will be a key to the whole subject. We can bring to its test any charges undertaken or any loss sustained in connection with a laden ship. We ask, Was this expense entered upon for the benefit of all parties concerned? Was this part of the ship or this portion of the cargo knowingly and voluntarily destroyed or abandoned to procure the safety of all the remaining united interests? If we can answer in the affirmative we may be pretty certain that those costs or that loss are in the nature of General Average. To see whether an expense or a sacrifice do entirely fulfil this condition requires in

* Q. B. 45 L. R. 646 ; also *Crooks v. Allan*, 5 Q. B. D. 38.

many cases, it is true, more than a first-sight glance. Like other definitions, this begins by being simple, but in multiplying its application to cases, other points become involved, which must be considered and harmonized with it. Thus to take one example, the ammunition expended in defending a ship against an enemy, and the expense of curing the hurts of the seamen wounded in the defence, are held not to partake of the nature of General Average. The grounds on which this exception is founded are very nice, and probably are not strong; but the instance is given to show that other considerations sometimes intervene between the general rule and its particular application. And, again, the simplicity of any rule becomes interfered with after long use by the introduction of new questions concerning it, some of which are confessedly important, whilst others are rather to be called ingenious difficulties thrown in the way. Thus, respecting General Average, the question is raised, how far the successful result of any act is necessary to its being classed as a subject of general contribution. Again, whether the sacrifice of the whole of one of the co-interests can be considered to be for the advantage of all,—for that includes the interest sacrificed. And, how far the *consequences* of a General Average act are to be allowed to extend, and yet come within the definition. Also, to what extent it is necessary that the thing sacrificed should have been first specially chosen and limited. Such questions certainly create some uncertainty as to the original proposition: and there seems a tendency in people to a wanton introduction of complex reasoning about plain matters. “General Average,” said Baron Wilde, in *Miller v.*

Titherington,* “is a term of art, and must be explained by custom:” yet, usually, a person’s own mind fixed on the simple principles above stated will tell him more, and lead him to sounder conclusions, than seven wise men who can render a reason, but who do so subtilly and hypercritically. In all commercial transactions simplicity ought to be maintained as one of the first elements of safety.

A general description of General Average has been given at the head of this Section; but any common consent in the definition of its nature and limits will be found to be confined to the barest outline. All persons agree in the radical idea of sacrifice and distribution of burthen on which the entire system is founded, but beyond that ground there is an immediate divergence of opinion. The various views entertained on this subject, at home and abroad, may be gathered into three main lines of thought. As these diverse opinions are strongly held and often warmly defended, it will be well at the outset, to examine them shortly, especially as in doing so the reader is led at once into the centre and to the first principles of the matter.

The first view of General Average is one held very generally by foreign nations, and it certainly commends itself by its simplicity and the logical character of the argument by which it is maintained. It is that, given any act performed for the common salvation of the associated interests, *every* consequence flowing from that act is in its nature General Average. It draws no distinction between proximate and remote causes, mediate

* 6 H. & N. 278 ; 30 L. J. Ex. 217.

and intermediate consequences; it looks only to the original parentage of those consequences. And if it finds that the original act was the *sine quâ non*, without which act the results under discussion would not have had existence, it affiliates them all on the first act, and classifies the whole together as General Average.

Thus, if a deviation from a voyage be necessary for the preservation of all the interests, that first act of deviation being General Average all the succeeding steps (as of putting into port, discharging, warehousing, and reloading cargo, outward pilotage, towage to sea, wages and provisioning of the crew during the deviation and detention) are but parts of the same, and must be borne in the same manner from the moment of deviation till the ship has returned again to the spot from which she deviated.

With the more rigid doctrinaires of this school, especially the Spanish, the opposite position to the foregoing is held as vigorously. Thus, if a mast be accidentally broken, it would form a special claim on the ship's policy, under the name of Particular Average; and then the expenses going into and out of port, and all other steps necessary to reinstate and repair the vessel, must be classed also as Particular Average on ship.*

The French *Code de Commerce* does not go to this extent; and there are others who, holding the indivisibility of an act of General Average and the whole of its consequences, allow a General Average act to supervene on an accident. Thus, whilst the breaking of the mast, mentioned above, is not General Average,

* Adherence to the Code in this view is now being relaxed; and the Spanish principle is being assimilated to that of other nations.

the resolve to deviate and put into port does come under that head, because it is a voluntary act undertaken for the safety of all the interests endangered by that accident, and rendered necessary for restoring the ship to navigability. The second link in the chain—the act of deviation—thus becomes the initial act of General Average, on which all the succeeding circumstances hang together.

The English theory—and in this the French and some other foreign systems partly coincide,—does not commit itself to wholesale consequences. More timorous and less logical, eclectic but arbitrary, we draw lines of demarcation between link and link of the chain of results proceeding from an original act. This gives to our system its complexity, and sometimes, we must add, its uncertainty. As practical examples of this selection: If it be necessary to cut away a mast, to save ship and cargo, and in its fall the mast crush the bulwarks and rail, and tear away some sheets of metal sheathing, these damages are classed by us as General Average as well as the loss of the mast itself. But if after efforts to disengage and get rid of the wreck in the water, it still haunts the vessel, and by striking against her sides and bottom inflicts further injuries, these last damages are, by our rule, excluded from General Average. So, again, if in a port of refuge it be necessary to land the cargo for general purposes of safety, the labour of discharging and warehousing is brought into General Average, but the reloading those goods on board—the restoration of the *status quo ante*—is charged separately to freight, instead of forming a subject of general contribution.

The views of thinkers on the subject embraced generally by the foregoing programme here separate, and

divide themselves into two sections, forming the second and third of the divisions under which it has been said opinions may be gathered. The latter of these views may be named "the physical safety theory." It holds that the restoration to physical safety of interests, ship cargo, freight, &c., when they have been placed by sea perils in great danger, limits the office of General Average. The imminent destruction having been prevented, common sympathy, so to call it, ceases. Immediately after physical safety has been restored, any expenses unusual to ordinary navigation will fall on the particular interest which happens to incur them. If to land some cargo be the means to procure physical safety, the landing in a place of safety is to be classified as General Average; but after that, all expenses and risks on the goods so landed concern only the merchandise itself. The persons who maintain this opinion also hold that nothing justifies a General Average act except such a pressing danger as amounts to an absolute certainty of loss of ship, cargo, &c., without the performance of the act for which general contribution is afterwards to be claimed.*

Midway between these two extremes stands the view very generally entertained in our own country, and held by several other maritime nations. It rejects the idea that the scope of General Average is limited to the mere physical salvation of the united interests from a common peril; and it does not accept the definition of danger as confined to a moral certainty of destruction. It maintains consequences of a General Average act to be included

* See these views discussed by English Courts in *Attwood v. Sellar*, Q. B. D. 15th May, 1879, L. R. 52, and *Svendson v. Wallace Brothers*, 4 Asp. M. L. C. 550.

in General Average; that General Average is concerned not alone in preserving the bare material, but in restoring the capability of performing the voyage and completing the adventure in which ship, cargo, and goods are jointly engaged, the completion of which gives value to those interests. It argues that the compact which binds together the interests of ship, cargo, and freight, namely, the contract of affreightment,—whether charter party or bill of lading,—is not satisfied with mere physical salvation, for that might be attained by landing cargo on a dry rock in mid ocean, or leaving the vessel in some safe but distant harbour from which she might never reach her home. Nor does it confine the danger which can alone justify an act of General Average to “a moral certainty of destruction,” because that can never be demonstrated; and if the danger is so imminent, or rather the destruction so evident, then, as in the case of running a sinking ship on shore, the consequences of so doing cease to be General Average: reasonable choice is taken away, and the letting the vessel strand on rocks instead of sinking to the bottom of the sea is a mere instinct of self-preservation; a *pis aller*, in which judgment and the intention to benefit all the interests have little to do.*

* In the United States a different view is taken. It is, that to run a vessel on shore and thereby cause damage or loss, constitutes General Average. The Americans carry the theory so far as to say, that if a ship is inevitably driving on shore, but those in command observe a preferable place for beaching, and turn the vessel's head so that she grounds on the latter spot, that choice of a place constitutes a voluntary stranding, and its consequences are General Average.

I have to thank my friend Mr. R. Lowndes, of Liverpool, for his collection of American decisions on this subject. They are not yet adopted in English law, and they seem to carry the principle of voluntary stranding dangerously far. Scarcely anything is said in

These principles appear reasonable and moderate ; yet it must be admitted that the practical systems of Average based on them are not altogether consistent or quite satisfactory. Neither is agreement fully attained in the practice of those who hold the same views, generally, at home or abroad. The arbitrary element comes in. The point at which consequences proceeding from an initial act are to stop, and after which acts and events are to be taken as new and unconnected acts and accidents, is not always definable, and differs in the judgment of various writers and practitioners.*

them of damage to cargo by stranding of the vessel in which it is contained ; yet it has, of course, equal right to compensation with the ship. A decision of Mr. Justice Story, in 1839, has determined all the subsequent cases. The previous judgment of that eminent jurist Chief Justice and Chancellor Kent took the opposite direction. The thesis is so arguable, that as the judge must adopt one or the other view, equal qualifications may lead to opposed conclusions.

The practical character of the English mind made it apparent, long ago, in this country, that it would be inconvenient and inexpedient to admit voluntary strandings in General Average. The uncertainty and difficulty of defining the damage, or the increase of damage, done to a ship and cargo in this manner would lead to so much angry discussion, and, indeed, open the way to fraud, that even if the principle were affirmed in favour of voluntary stranding, it would be desirable to let each suffering party bear their own loss. To the present time this method has worked well ; but who can tell, for the future, whether forcible advocacy or the mere oscillation to which all public and private opinion seems subject, may not carry us, at least for the time, into a new position, and bid us adopt the view held in the United States concerning voluntary stranding.

* The French code having enumerated eight heads of General Average, concludes the list as follows :—"And, generally, damages voluntarily sustained, and expenditures made, in accordance with special deliberations, for the welfare and common safety of ship and merchandise, from the time of loading and departure till their return and discharge." These comprehensive words deserve to have their precise meaning well understood. They are, "Et, en général, les

Were the grounds considered on which our practical system of General Average contribution is based—the application of which has till recently been enlightened by few legal decisions,—its apparent inconsistencies and some actual differences of opinion in details would not be thought remarkable. It is only superficial observers who suppose, in any subject, that everything is fixed, certain and clearly defined. The more anxiously any system is examined the less is absolute certainty discoverable, and the more need is seen to be required for respectful consideration of the doubts and differing opinions of others.

OF JETTISON.

Jettison signifies *a throwing overboard*; and was probably the first occasion of General Average contribution. The word *Jetsam* in the old English speech was used for things thrown overboard, and afterwards cast on shore; if found floating, they were named *flotsam*, whether wreckage or the result of jettison.

It seems agreed by as common a consent that the germ of General Average is found in Jettison, as that the fragment of Rhodian law which has been preserved to us first formulated the simpler principles of justice concerning maritime adventure. Not but what those principles may have had an earlier existence than Rhodes itself. The quick-witted Egyptians, and the Chaldees of Babylonia, who in their ways and methods seem a good deal to have resembled Europeans of the present

dommages soufferts volontairement, et les dépenses faites, d'après délibérations motivées, pour le bien et salut commun du navire et des marchandises, depuis leur chargement et départ jusqu'à leur retour et déchargement."—*Code de Comm.*, Livre II., Titre XI., Art. 100.

day, would scarcely miss applying obvious rules of equitable conduct to be observed by the men "whose cry was in their ships," and whose maritime commerce demanded such regulations for its safety.* In the case of Jettison the cause and the consequence are so closely connected, the means taken to procure safety where danger was imminent, and the propriety of making all the persons who received pecuniary benefit by those means share in indemnifying the sufferer are so plain and clear, that they speak to our commonest feelings of justice. Jettison is the casting out of the ship, when in great danger, a portion of her cargo, or a part of her own stores, materials, &c. It is requisite that the act should be performed advisedly and deliberately; and before proceeding to effect it the master usually consults the ship's company and obtains their concurrence as to the necessity for the sacrifice.† It does not appear that, at first, the ship was made to contribute for jettison of cargo, but the owner lost his freight on the goods jettisoned. Thus

* Indeed, my friend, Mr. Cornelius Walford, a diligent contributor to the literature of Insurance and other subjects, is ardent in his expectations of what Egypt may reveal; and he expressed to me his intention, when opportunity permits, of questioning those ancient records on the spot, where as papyri are unrolled, he expects to find, at least, the forms of a Bottomry Bond. The Chaldean Cylinders may yield the same desiderata, or more. Within a few months Egyptian documents have been deciphered which applied to the Nile navigation, and were very similar to our bill-of-lading.

† By the law of England the master is not bound to consult with his officers or crew previous to the sacrifice, although this course, when practicable, is often prudent.—*Maule and Pollock*, p. 192.

"Not necessary, but preferable," says the Commentator on the French *Code de Commerce*. "Such consultation is a precaution evidently impossible to fulfil to the letter in cases of emergency."—*Bedarride Comm. du Code de Commerce*, secs. 1667, 1668.

in a case mentioned by Sir Travers Twiss (*Black Book of the Admiralty*, Intro. 51), a complaint was made to the king, 13th year reign Edward I. (temp. 1285), on the part of the barons of the Cinque Ports and the mariners of Yarmouth, against certain merchants of England and Gascony, who had chartered ships from them, and wished to make the ships contribute to General Average in respect of Jettison of cargo. The barons contended that the usage had been, from time out of mind, for ships to be quit of all contribution, saving only loss of freight, in the case of goods cast overboard.

Nevertheless, in the case of being obliged for the general safety, to cut away a mast, or a cable, the goods had to contribute to the loss and damage. There was, however, this proviso, that if any of the merchants are on board, they must be called to observe the necessity of cutting away and the reasonableness of the act. (*Black Book*, p. 99.)

The occasion and circumstances of the Jettison ought to be carefully inscribed in the log-book, together with the exact quantities of the articles so lost, as far as they can be ascertained at the time. On the ship's arrival at her port of discharge the particulars of the Jettison can be verified or corrected.

Such are the formalities. On the distinction, as affecting insurers, made between things thrown overboard from the deck and those below deck, there will be occasion to speak hereafter. Of the ship's stores cast into the sea, only those are allowed to enter into General Average which were in secure and proper situations previously.

The objects thrown overboard must have been expressly selected for the purpose. To throw away that which must of necessity be lost independently does not come under the term Jettison. Neither, to cast overboard a wreck of spars and ropes which have been carried away in a gale and which are encumbering the deck. This latter act is one, indeed, of prudence, but not one entitling general contribution. The first or actual cause of the loss is not voluntary, but is in a peril of the sea; and the subsequent cutting away the wreck merely completes what had before been begun by the winds and waves. By some foreign regulations the value of the wreck itself, as wreck, is allowed in General Average, and this appears reasonable enough; but, hitherto, no such allowance has been made in this country. Nor will it be allowed to charge as General Average the throwing overboard certain parts of the furniture and stores of the ship which are by custom carried in notoriously unsafe situations; such as water-casks, a stern boat hung on davits, hawsers and warps coiled on deck (except when in the vicinity of land), and a few other things.

It cannot be too often remembered that for the definition of Jettison, the act must be deliberate, and the sacrifice specific. It is the want of this consideration, and of this choice and limitation, which makes it so undesirable that damage by running a ship on shore, though there is voluntariness in the act, should be admitted in General Average. The choice should even include the selection, where possible, of the weightiest articles of the least value; or those whose presence is most dangerous and inconvenient to the navigation of the vessel. We have heard of such things as a chest of

silver plate being thrown overboard, the weight of which was as nothing in relieving the ship, whilst the value was considerable.

With regard to articles carried on deck, opinion is apparently changing a little; and, indeed, practical people confirm the shipmaster that there is no other place but the deck for carrying some stores, but that they should be properly secured. Small vessels filled with cargo have no room below for carrying their ropes. In most cases, a harness-cask and water-cask must be at hand, together with some other necessities, since in violent weather, with seas flooding the decks, it would be dangerous or impossible to open the apertures to get at them. Nobody, yet, has pointed out that boats, though singularly exposed to danger, should be excluded from Average when lost overboard. The subject of things carried on deck is farther considered, later on.

As to Freight.

The freight being, so to speak, contained in the goods, shares the fate of the merchandise, and is jettisoned with the goods thrown overboard. The lost freight is, therefore, also recoverable by General Average contribution.

Value of the Things jettisoned.

The first point which requires to be settled is as to the value of the articles jettisoned to be taken in adjusting. Here the rule is plain and very reasonable. The person whose property has been sacrificed for the common benefit is to be placed in the same position relatively to the other persons associated with him as if his goods had arrived

with theirs at their destination. An actual loss has been sustained, and it is to fall on all the co-adventurers. The particular sufferer is to be left neither better nor worse off than the others. Not worse—for the co-adventurers are to make good his loss: not better—for he contributes to his own deficiency. Did he not do this he would be better off than the rest, for he would receive his interest in full whilst the others would be rated in order to reinstate him. But as he is not suffered to lose by the transaction, so neither is he allowed to make a gain of it. The market value of goods similar to those of which he has been deprived, at the time of the ship's arrival, is to be ascertained. If some of the sufferer's goods out of the particular parcel from which the jettison was effected arrive, the comparison will be easily made by their means. Unless there be some very clear proof that his goods were damaged at the time they were thrown overboard, it is to be assumed that they were sound; and the fact that other of his goods arrived in a damaged condition will not militate against him unless it can be shown that their damage took place previous to the jettison. From the market value of the goods, estimated by taking the invoice weights properly reduced, or else by a comparison with that portion of them which actually arrived, are to be deducted the freight, duty, brokerage, landing charges, &c., which would have been paid had the merchandise come to market in its usual course; the object being to place the jettisoned goods on exactly the same footing with those of the same kind and quality which reached their destination. The only charge that should not be deducted is the merchant's commission, for that was his expected profit attaching to the lost goods, and

he has been deprived of it by their sacrifice equally with the owners of the goods or the freight who lost their property for the general good : and his commission is an insurable interest.

The gross amount of the freight sacrificed by the jettison is also to be ascertained, and to be included in the Average.

Occasionally, the invoice costs or shipping value of the goods jettisoned is resorted to. This usually happens when a jettison has occurred soon after the sailing of the ship, which puts back to her port of departure, and it is desired that the Average should be settled without waiting for the completion of the voyage. In this case care must be taken to place all values on an equal footing, *i. e.*, to ascertain them all at the same time and place. This arrangement, however, is rather convenient than correct.

The value of stores and appurtenances of the ship when thrown overboard are more easily discovered. When they are replaced with new articles of the same sort, common consent has decided that two-thirds only of their full value shall be charged in the Average statement, the other third representing the previous wear they had undergone. A sixth only is deducted from chain cables ; and anchors are allowed in full. If the vessel be on her first voyage no deduction is made from the value of the stores and materials. This arrangement has followed the method of adjusting Particular Average on ships, which method has been pronounced reasonable by Courts of law.*

* See *Lohre v. Aitcheson*, and *Aitcheson v. Lohre*, H. of L. July, 1879

Contributing Values.

We now come to the second question, viz., upon what values are the interests benefited by the jettison to contribute. The answer is unobjectionable. The benefit resulting to each of the co-adventurers is to be the measure by which the contribution of each is fixed. The actual value is to be taken of ship, cargo, and freight at the port where the voyage terminates and the various interests become dissociated. The articles jettisoned contribute in the same way as those which arrive. Were it not so, the person whose goods were thrown overboard would be in a better position, eventually, than the others; for he would have the value of his missing property made up to him in full by contributions from the rest, whilst *his goods alone* would be free from the expense of that contribution. Although, therefore, it may at first sight appear paradoxical, it is quite right that the suffering co-adventurer should contribute towards his own loss. When a second accident producing General Average supervenes, the later Average is first apportioned, and is deducted, as charges, from the values on which the first Average is divided.

Weight once proposed as a Basis.

It was at one time thought that, as the actual and immediate effect of a jettison was to relieve the ship and cargo of part of the inconvenient weight she laboured under, weight and not value should form the scale for

recompence and for contribution. Further consideration, however, showed that this view was erroneous, and that a monetary basis was the best and most equitable one which could be adopted.

Analogous Cases.

Besides the plain and unmistakeable act of jettison heretofore spoken of, there are other measures taken in order to escape from danger which are of the same character as jettison ;—analogues of it, without being absolutely identical.

Of such is the case of goods discharged into boats for the purpose of relieving the ship when in danger, and one or more of those boats sinking. So, again, of goods discharged from the vessel with the same motive, and placed on a rock or other insecure place, from which they are afterwards washed away.

So with timber put overboard to lighten the ship—made into rafts, but subsequently lost by the rafts breaking adrift.

Means used, and Consequences.

The means and consequences of effecting a jettison may be classed with it, though not coming under the same name. In an adjustment of Average these should follow in the immediate train of the jettison. Such are the breaking down of bulkheads, and other damages done to the ship in order to get at the cargo which is to be thrown overboard : also, the injury inflicted on the sides of the vessel and its metal sheathing by the act of jettison, or afterwards by the objects floating in the water.

The instances mentioned above, viz., of goods lost in boats in which they had been discharged, or from rocks and other places on which they had been temporarily placed, might be called *mediate jettison*. The means taken had the same object in view as an absolute casting of the goods into the sea—to relieve the ship, and so to save the remaining interests: and because an attempt was made to prevent their instantaneous loss, which must have taken place had the goods been simply thrown overboard, this economical act is not to operate against the owner of the goods thus eventually lost. In these, as in all other cases of voluntary loss, the spirit of the act is to be inquired into. And, as common sense is said to be the true interpreter of common law, so a truly equitable consideration of circumstances will prove a safe guide for determining all such questions.

Loss of Goods during Discharge.

There are some cases of difficulty which must be decided either by a very practical judgment of their merits, or must be submitted to some rule or usance. In the latter alternative, such practice or rule must have regard to the particular and surrounding circumstances, and to the general principles of justice. When such a rule can be established and acted on it saves much discussion. A case of this kind presents itself in the loss of quantity which frequently attends the process (often a hurried one) of discharging cargo when a vessel is on shore or in other need of being lightened. The same kind of loss may occur when a ship enters a port of refuge and a discharge of the cargo or part of it is necessary in order to repair

damages. The loss is not a jettison, but an incident of a procedure—the discharge of cargo—necessitated by sea perils. The loss cannot be strictly said to be voluntary, yet the act was so to which the loss was an incident. A waste of quantity nearly always attends the discharge and reshipment of grain. Other articles, sulphur for instance, when partly in pulverised form, meet with loss by escaping through the baskets used, and by being blown away by the wind in the process. Coals also lose value by breakage when discharged, as well as something in quantity. All the losses here spoken of have their origin in the necessary but voluntary act of discharging for the general safety. As such, some persons class them in the category of jettison, or look on them as having a similar character.

There is nothing in this view inconsistent with the true notion of General Average, or unlike that form of it which we have been considering—jettison. It is to be observed that the loss of material whilst being discharged is not a consequence, more or less remote, of an act performed for the general benefit, but a concurrent, and it may be a necessary, incident of that act. On the other hand, it has been urged that there is an indefiniteness in this species of loss that takes it out of the list of voluntary sacrifices. It has also been said, but with less pertinence, that the loss or waste under the circumstances of a forced discharge is rather to be attributed to the nature of the article itself than to a deliberate act. To this objection it is sufficient to remark that we must take substances as they are. Their nature or peculiarities cannot be altered suddenly, although the fragility, granular character, &c., may add to or form a new

feature in the loss incurred by discharge, &c., of such goods.

In result, it may be stated that in practice a compromise of principle has been adopted, and that when the forced discharge has been at sea or whilst a vessel is on shore, into boats, craft, &c., it is to be contributed for as General Average; but when the vessel has been brought into a harbour or to a wharf, any loss by a necessitated discharge must be borne by the owners or insurers of the article itself. This arrangement is rather arbitrary, and I state it without attempting to defend it. Nor can we consider this merely factitious distinction a final arrangement. It does not rest on any judicial decision, and may be swept away, like other customary practices, by the first case in which judgment is given. And, secondly, the mode of dealing with such loss or damage is inconsistent with right and logical reasoning. The more the present practice and the distinction it sets up are reflected on, the more unsatisfactory do they appear. The loss of cargo—grain for example—discharged at a distance from a regular quay or landing-place, and grain discharged close to that quay, is a question solely of degree. The principle which asserts that the loss of twenty quarters, discharged two hundred yards from a wharf, is the same as if fifteen quarters were lost in discharging one hundred yards from the wharf, should extend to a loss of ten quarters, discharged when the ship's gangway has been brought as near as is possible or common, to the wharf. If the discharge and the reloading are the efficient cause of a loss of twenty, or fifteen quarters, so are they of the loss of ten quarters. If the discharge of cargo is the *sine quâ non* of a loss of twenty or fifteen quarters,

it is equally the *sine quâ non* of the loss of ten quarters. Those ten, fifteen, or twenty quarters would not have been lost except for the necessary discharge ; and one is, in essence, as much an item of General Average as the other.

When, however, during a necessitated discharge of cargo one or more packages are lost by falling into the water, these are recoverable in General Average, whether such loss occur out at sea or at a wharf in the port of refuge.

Damage to Goods in the Hold during Jettison.

It sometimes occurs that in opening the hatches to effect a jettison, an occasion which necessarily happens most frequently during bad weather, water enters the hold by the hatchway, and injures the goods stowed in the neighbourhood. On proposing this case there scarcely seems room for a doubt that such damage should be treated as General Average, similarly to jettison, not only as being quite analogous to that, but actually involved in the act of jettison itself. Yet the question as to how such damage should be disposed of is by no means a settled one. Few people probably would be found to dispute the *principle* which makes such losses General Average, except upon some fine-drawn argument about the extent and intention, the mediate and immediate consequences, of voluntary acts. Such reasonings appear too metaphysical to apply to mercantile questions, which should be answered in a simpler manner ; and the advocates of such fine distinctions should be asked, whether, with our finite powers, we can ever

foresee *all* the consequences of any act of ours; and whether we can curb or prevent effects depending on such acts from extending far beyond the limits we at first intended. Take the analogous case of water poured on a burning house to extinguish the flames, and which water destroys the books in the library; will any one urge in favour of an insurance office not paying, that damage by water was *only incidental* and unintentional, and, therefore, removed from the rule which makes the insurance company liable for fire? No such argument would be maintained for a moment.

There is, however, more show of reason in an objection being made to this kind of damage constituting General Average, on the ground of *expediency*. This is the true root of the objection, which, when honestly avowed, is entitled to its full weight. In principle it does not seem to be of much importance whether cargo be thrown into the water or water be thrown into the cargo, provided the act were required for the salvation of the joint interests, and was undertaken for that end. But if it be urged that the admission of claims of this kind is opening a dangerous door to fraud, and leading the way to extreme uncertainty; if it can be shown that it is next to impossible to distinguish what damage did really accrue in consequence of a voluntary act, and how much of it arose from leakage and other involuntary causes; if it be told us as a matter of fact that at a time when such a principle was acted on very numerous claims were made, especially in certain trades, and which are known to have been fraudulent,—we should be right in saying that though we adhere to our rule as a matter of principle, yet it may be better to depart from it in some cases on the ground of

convenience and for the avoidance of fraud and uncertainty ; and to draw some arbitrary lines,—only admitting frankly that they are arbitrary, and are drawn on account of the reasons stated. But resort to this arbitrary line should never be had where a case is clear, definite, and free from suspicion. In the United States the damage under discussion is charged in General Average. Indeed, to such a length is the principle of voluntary damage carried out, that when a ship on fire is scuttled and sunk, it is the American practice to estimate all the damages thereby received by ship, cargo, and freight, and then distribute them on the values of those three interests. Were the rate of damage on ship and on all the parts of a miscellaneous cargo equal, it is plain that the result would be the same as if each separate portion of the interest bore its own. But this case is scarcely conceivable. Sugar would dissolve, whilst iron would be comparatively little injured. The English practice does not correspond with the American view in this matter ; and difficulties have arisen on adjustments made in the United States and sent here for settlement. This want of correspondence has probably led to a hesitation, which I have latterly noticed, in the assertion of the principle by the American adjuster.

With regard to injury received by goods during a jettison, whether by the inevitable admission of water, or by damage done to other parts of the cargo in breaking out the packages to be thrown overboard, there can be little doubt that according to the doctrine of General Average they should form a subject for joint contribution. The principle was formerly set aside on the ground of expediency, and of the inconveniences of carrying it

out in practice, involving the uncertainty which must generally prevail as to the true cause and the actual extent of the damages claimed. Such difficulties have now to be faced, and the facts ascertained.

In France, the *Code de Commerce* distinctly settles this question, and enumerates in Article 400, amongst the subjects of General Average, “damages occasioned by a jettison to the merchandise remaining in the vessel.”

Jettison of Deck Cargoes.

Much difficulty has been experienced in dealing with the jettison of deck cargo. It answers the purpose of the shipowner to carry cargo on deck, to increase the earnings of his vessel; and it is frequently a convenience also to the merchant, to send away as large a quantity as possible of timber or other goods in one bottom. But it is very supposable that to encumber the deck of a ship with cargo not only places the goods so exposed in a situation of additional danger, but entails increased risk on the vessel and the cargo below deck, by the surplus weight, the elevation of the centre of gravity, and the greater difficulty occasioned in manœuvring the ship. The law formerly interposed to render deck loads illegal on certain voyages except within prescribed seasons;*

* By the “Customs Consolidation Act” of 1853, 16 & 17 Vict. c. 107, deck cargoes were forbidden to be carried from ports of British North America and Honduras, between the 1st of September and the 1st of May. The clearing officer was to give a certificate that all the cargo is below deck. Penalty on the captain for sailing without such certificate, 100*l.* for each offence. By the last emendation of the Act (1866) all such restriction is removed.

By the Act 39 & 40 Vict. (1876), to amend the Merchant Shipping

but such restrictions have since been abolished, and there now exists no illegality in carrying merchandise on deck. Deck cargoes are common at all seasons, and in some trades are invariably carried. Were the two consenting parties alone concerned, viz., the shipowner who takes a deck load and the merchant who ships it, there would probably be but little dispute, because each would be cognizant of the risk he thereby incurred,—the one of losing his goods, the other of losing his freight, and both of them imperilling the entire joint adventure. As between these two parties, therefore, a settlement is made by each contributing towards the joint loss, *ad valorem*.

But there are two other classes of persons whose interests may be damnified by this proceeding, and they must be considered.

First, there may be shippers of goods below deck quite unconnected with the proprietor of the goods on

Acts, s. 24, the law stands thus : A penalty attaches to the master, and, if privy to the offence, to the owner, for carrying the articles on deck, of which the species and extent are described in the Act, when a British or foreign ship arrives in a port in the United Kingdom from any port out of the United Kingdom, between the 31st of October and the 16th of April following (*a*), of five pounds for every hundred feet of wood goods carried in contravention to the Act, the penalties never to exceed one hundred pounds ; recoverable by summary conviction. No penalty incurred provided the ship sailed at such a time before the 31st October, as, on an average voyage, would allow time for her arrival before the day last named ; nor if she arrive before the 16th of April, by reason of an exceptionally favourable voyage. This section does not affect any ship not bound to a port in the United Kingdom under stress of weather, or for repairs, &c.

(*a*) This is what is intended, but it is erroneously expressed in the Act

deck, and perhaps ignorant when they sent their property on board of the intention of carrying any deck cargo. These will urge that in case the deck-load is thrown overboard, although for the general preservation, they must not be called upon to contribute to the loss, inasmuch as they never assented to goods being placed on board in an extra-dangerous situation, at *their* risk ; but, on the contrary, that they are the injured parties by the general increase of danger caused to the whole of the interests through carrying a deck-load at all. They will, at most, consider themselves unconcerned in the fate of goods aboveboard, whether they be safe or lost ; and will not consent to contribute to reinstate the loss of them, although admitted to have been voluntary, and determined on to relieve the ship when she was in danger.

So far their argument and cause appear good. But a contrary doctrine may be maintained if it can be shown that the custom of carrying deck-loads is so usual and so well known that every shipper in particular trades and places is well aware of this fact, and ships with that knowledge in his mind. There is an important trade consisting of the importation of cattle and other live stock into this country, a considerable part of which is carried on deck. The deck becomes the proper, because the best, place for seaborne animals. The case of *Milward v. Hibbert** related to the throwing overboard a quantity of pigs from the deck, but it was never brought to a satisfactory conclusion. It is thought, however, to support the doctrine that the jettison of living animals carried on deck according to custom is General Average.

* 3 Q. B. 120.

Any other sacrifice of live stock carried on deck than by actual jettison must necessarily be rare, but it would be *à fortiori* General Average. A remarkable case occurred (Dec., 1856) of a steamer, the *Troubadour*, bound from Cork to Milford with a deck cargo of live stock, being driven to burn 150 pigs for fuel in the boiler furnaces, the vessel having exhausted her own fuel during an extraordinary detention at sea, caused by violent adverse weather. It is proper to add, however, that the pigs had previously died from the severity of the weather. In the extremity to which the ship was reduced, every spar and loose piece of timber on board was also burnt.

In *Wright v. Marwood*, 12th Nov., 1881,* cattle were carried on deck and thrown overboard, for the general safety. The Court of Appeal, reversing former judgments, decided against the owner of the cattle. The Court held, when there is no custom to carry goods on deck and the voyage is not a coasting voyage, the owner of deck-cargo, necessarily jettisoned, has no claim for contribution against the shipowner or the other cargo owners, though the contract between him and the shipowner specifies that the goods are to be carried on deck. And Bramwell, L. J., added, the law of this country, as did the law of other civilized countries, held the practice of carrying cattle on deck to be illegal, and it is very undesirable our law should differ from other nations, which it would do if the decision was otherwise.†

* 19 C. B. N. S. 563.

† But now the case of *Burton & Co. v. English & Co.*, Appeal, 18 December, 1883, has to be considered in its bearing on deck-jettison, generally. *Vide post.*

We might add the comment, that many people think that on the score of humanity towards animals, the deck is the best place for oxen and other living creatures.

Secondly, the insurers have to be considered; and their position is discussed a few pages onward.

Dangerous Articles carried on Deck.

Contribution cannot be demanded in respect of articles notoriously dangerous in their nature thrown overboard from the deck; such as nitric, muriatic, and other destructive acids, lucifer matches, and similar objects which are explosive by percussion or friction. These things, many think, should not be carried at all on board ship, but if taken, it should be always on the condition that they will be carried on deck, either exposed, or in a round-house, and with an understood promise that they will be thrown away at the first occasion of danger, whether arising from their own nature or from perils which act upon them.

Of the previous Security of the Things jettisoned.

A reasonable doctrine was formerly held that in order to give a claim for general contribution in respect of jettison, the articles voluntarily sacrificed must have previously been in a state of safety. To throw that away which cannot be retained, to give to the sea what the sea is washing away, does not fulfil that condition of choice and voluntariness which is so necessary a part of jettison and of all General Average. If, therefore, any articles are already disturbed from their proper place on deck, so that they are no longer in their normal state of security but are in progress to loss, to get rid of them because they cannot be re-secured, and because their

state of danger is entailing a state of danger on the other interests and to the crew, has been considered not to be an act of General Average, although an act of propriety and prudence. When deals, sleepers, &c., have broken from their lashings and are washing about the deck, endangering the bulwarks, hatchways, &c., and preventing the crew working, it is unquestionably a very justifiable act to get rid of these dangerous obstacles, but there is little choice or selection in doing so. It must be always remembered that there are acts which not to do would be imprudent and culpable, but the doing of which is not necessarily an act of General Average. And we must also bear in mind, that many decisions taken and acts done at sea in danger, are done for the sake of the human lives on board, and not at all, or only in a secondary degree, in reference to the interest of the ship and cargo. Often the safety of lives is bound up with the safety of the material interests, and the motive of measures taken to preserve the former, regulates also the incidence of the loss or sacrifice. But this is not always so; as is seen in a crew abandoning a ship in danger and in other instances, where self-preservation is the first and only motive.

Since the decision in the Court of Common Pleas in the case of *Johnson v. Chapman*,* this doctrine, as it regards deck-jettison, can no longer be confidently affirmed. In that case the deck-cargo of the *Shooting Star* broke adrift during heavy weather; and though rescued, it again broke loose several times, damaged one of the boats, and afterwards was shifted by the sea against the pumps, so as to prevent them being worked. A quantity of the deals and staves thus drifting about the deck was

* 19 C. B. N. S. 563.

thrown overboard. Willes, J., delivered the judgment of the Court to the effect that the jettison of the deck-load was an act of General Average. He admitted the propriety of the practice of Average-Adjusters in rejecting from general contribution the sacrifice of what is already "wreck," but denied that "loose lumber" can be called wreck. The deals and staves, though washing and drifting about the deck to the danger of the ship and crew, were voluntarily sacrificed, and must be rateably contributed for by all the interests. Since this decision, Adjusters have stated claims for deck-load jettisoned, though previously broken adrift, as General Average.

In pronouncing this judgment, Justice Willes made two important observations. The first relates to the legality of carrying deck-loads. He said, "It is not suggested that there is any Statute to make a deck-cargo illegal; *therefore, it seems something more than custom to have deck-cargoes.*"

The other remark, which was made by way of illustration, and therefore rather as an *obiter dictum*, bears on a difficult part of the practice of Average-adjusting—that of consequential damages. Having admitted that the wreck of masts, &c., carried overboard by an accident, required to be disengaged from the vessel, the mere cutting the ropes to let the wrecked materials go would not convert their loss into a General Average claim; "but," the Judge continued, "if instead of cutting away what is virtually lost only, you cut away a portion of what is still on board and safe, except for the common danger—for instance, a mast or bowsprit—for the purpose of facilitating the getting rid of the wreck, which is only encumbering the vessel,—if you do that, you ought

to receive Average in respect of the portion you so cut away, because *that* you do sacrifice."

We shall have occasion to recur to this view when speaking of accessory and consequential acts of General Average.

What should be esteemed wreckage, and what materials, being at the time they are got rid of, by accident, in a wrong place or position, is so technical a question as often to require the experience of a nautical man, and is out of the ambit of a Judge. When in *Johnson v. Chapman* the Court took a distinction between sleepers washing up and down the deck and ship's materials in a state of wreck, allowing the loss of the former to be in nature General Average, we must suppose the implication to be that ship's materials washing about would be wreckage, and not recoverable in General Average. The only point open is, which are articles rightly on deck, such as buckets, studding sails, &c., and which are articles out of place when on deck, and which should not have been exposed to the danger of being washed or thrown overboard. But more difficult instances have come forward for decision, and are not so easily disposed of, even if a negative implication be convertible into an opposite affirmative.

Two cases have been tried since *Johnson v. Chapman*, having an important bearing on this subject. The former of these, *Corry v. Coulthard*,* was tried before Baron Cleasby at *Nisi Prius*, and the verdict of the jury was confirmed by the Court of Appeal, January 17th, 1877. The case was not reported at the time, but was gathered in full detail from the shorthand

* 2 C. P. D. 583.

writer's notes, at the subsequent trial of *Shepherd v. Kottgen*,* which will be mentioned later on. These two well-contested causes had several circumstances in common, but were differentiated so far as to have given opposite results to the litigants. In *Corry v. Coulthard*, which related to the steamer *Star of Erin*, during a heavy storm the mainmast was observed to be settling down, causing its rigging to slacken sufficiently to allow the mast to roll about in a dangerous manner. Means were taken to reduce the danger; but the master, supposing that the cause of sinking was that the heel of the mast was penetrating the plates of the ship's bottom, in which event the ship and all would have been lost, ordered that the mast should be cut away, and this was done. On subsequent examination, the master's supposition was found to be erroneous; the mast was of hollow iron, and the sinking was due to the weight and pressure causing the edge of the bottom part to turn up, and so shorten the length of the mast. It is necessary to mention this, because the dictum of the Court, which is very important, is that the decision to sacrifice material thus, is justified by the master having acted on his best judgment, made at the time, as to the danger; and that justification is not withdrawn on discovery that the fact was not what he supposed in his "reasonably sound judgment." Under certain definitions laid down by the Court, the jury gave a verdict in the shipowner's favour, which involved the decisions that the mast was not in a wrecked state when it was cut away, and was not a valueless object, the evidence having satisfied them on these two points.

* C. P. D. 585.

In the same year the cause of *Shepherd and others v. Kottgen and others* * came before the Court of Appeal. As in the previous case, during a storm, the rigging of the ship *Rollo* became loose, and portions of it gave way. The mainmast, in consequence, lurched heavily. They wore ship to try and save the mast, but wished it would break on account of the danger they were under, viz., that by its lurching, it would break the ship out. The master then ordered that the main rigging should be cut, which led to the mast going overboard. The judgment of the Court was that there was no claim for General Average; that the mast was as good as lost before it was cut away, therefore there was no true sacrifice. "The thing abandoned," said Cotton, L. J., "was in such a condition that it must have been lost, anyhow; the hastening on of its destruction is not a voluntary abandonment, and cannot be sufficient ground for contribution. This loss was not caused by the act of the master, but by the peculiar peril of the thing itself."

It is not apparent that these two cases will greatly assist those who have practically to adjust averages. To some it will seem that the circumstances of the two are very parallel and similar, and to some minds the second trial will appear somewhat as a revision of the former decision. Besides, the matter is not so simple as in the bare outline given above. Several suppositions were put forward. Suppose that the vessel sank notwithstanding the cutting away. Suppose the mast may be considered hopelessly gone before it was cut away. Again, what would be the value of an article sacrificed

* 2 C. P. D. 585.

when in a precarious state, but still remaining till cut away. Should it be held to have some value (as is the foreign view), or no value at all? Suppose if fine weather soon supervened, the imperilled and imperilling article could be saved. Suppose the only thing which prevented the mast or other object being saved was the present violence of the weather. "The beneficial objects of the doctrine and law of General Average," said Grove, J., "would be frittered away if, where a sacrifice is made to save the whole adventure, the sharing the burden of such sacrifice could be made to depend upon nice questions of probability, afterwards discussed, as to whether the thing might or might not have been saved." *

Speaking generally, it must be held that for a true sacrifice, at least, of parts or stores of a ship, the articles must have been in reasonable safety, and could be secured except for the immediate and pressing danger. And as to goods, if though in a place of safety, they have to be thrown overboard for the general benefit, only such value can be claimed in General Average for their voluntary loss as they would have had if they arrived at their destination. So that if the goods were in a damaged state before their sacrifice, only their damaged value is claimable in general contribution.

By whom loss by Deck-Jettison is to be borne.

In the case of other acts of General Average, contribution is made by all parties concerned in the joint-adventure, according to the values of their several interests. In jettisons of deck-cargo alone the distinction has

* *Shepherd v. Kottgen.*

hitherto been drawn that contributions can only be demanded from the parties who consented to permit a deck-load to be carried. Thus the ship, and with it the freight, is liable to contribute to such loss, and the shipper of the deck-load, both in respect of his goods actually carried above board and of those below deck,—he being conspicuously a consenting party. But it is said that an independent shipper of goods below deck ought not to contribute, because his consent was not asked or given that the ship should be loaded in a manner which would add increase of danger to the marine adventure. As long as this exceptional position is conceded to the “innocent” shipper, either the value of his goods must be altogether excluded from the contributing capital, or, as it is sometimes arranged, the value is to be included, and the shipowner made to bear, together with the deck-shipper’s goods, the contribution of that part of the cargo.

In a case, before the Court of Session in Scotland, the responsibility of carrying a deck-load, without the consent of shippers under deck, was brought home to the shipowners greatly to their loss. In *Macculloch v. the Owners of the Sir John Moore*, tried in January, 1867, the plaintiffs were shippers of a cargo of wheat, and a very large portion of it, more than half, was delivered in a damaged condition at the end of the voyage, in Liverpool. The plaintiffs maintained that the damage to their grain arose through the act of the captain and owners, who in the fall season of the year took, in addition to the wheat, a quantity of deals in the ’tween-decks and a deck-load of the same goods,—the ship being from her build unfitted for such additional

loading. The vessel met with tempestuous weather, sustained damages, and the cargo of wheat was also injured. Lord Ormidale issued an interlocutor, finding the plaintiffs entitled to £1100 damages.

A very important question consequently arises as to the incidence of loss by deck-jettison. It would be a very simple method to say that as the shipowner and deck-cargo owner are the consenting parties, they must share the loss of the goods thrown overboard from deck and the freight on the same between them; and that when the cargo-owner has goods below as well as above deck, he being consentient, must contribute on the value of both parcels, *i.e.*, on his entire shipment. But if, as we must take it for granted, the whole adventure was in danger, and was rescued by the jettison, the benefit applies to all the interests, since all were saved by the sacrifice. By convention, the non-consenting owners of value on board cannot be called upon to contribute to such sacrifice. Who, then, is to bear ultimately the quota which attaches to cargo under deck? It must, as matters stand at present, be borne by the ship and the deck-cargo and by any under-deck goods belonging to the owner of the deck-load. Some adjusters adopt another and more complex mode of apportioning deck-load loss, which, however, on examination, does not show itself more equitable than the method mentioned above.

On the whole, it would seem, that the conventional manner of looking on deck-cargo and the feelings of insurers about it, somewhat outstrip the law. It has been shown that there is little restriction placed by the law on the carriage of goods on deck; the principal

point requisite is, that when, by permission, they are so carried, proper notice should be given to the shippers. And with regard to wood cargoes, the seasons and places are specified by the Merchant Shipping Act when deck-loads become illegal.

The position given to deck cargo creates difficulties and leads to many discussions. Unquestionably, the encumbering decks with cargo does in some cases increase danger, and makes the working of the ship less easy; but it is not always so. There are some trades where deck-loads are invariably taken, and the system is perfectly known by all persons concerned. Some vessels are also built purposely that they may carry cargo on deck; and we have heard it asserted that many vessels sail better, and are in better trim with some weight above. It becomes a question whether it would not be better to abolish the distinction between cargo shipped under and above deck, except in such glaring cases as produce unseaworthiness, when the overloading a vessel would become a punishable offence. One other word may be added. It is always taken for granted that it is the greediness of a shipowner which leads to taking in too much cargo, or storing it in unsafe places. Experience shows that shippers are often quite as much in fault, by heaping a burthen on a vessel above her strength and safe capacity.

How Deck-Jettison affects Insurances.

Another important interest which connects itself with those hitherto considered must now be introduced. It is one which very much influences all questions of

Average,—that of the underwriters or insurers. We have not yet had occasion to refer to insurance as an element in general contribution; but practically, insurance is so interwoven with the fabric of marine commerce that it is difficult to eliminate it from any of the questions which concern perils of the seas. Still, the underwriter's interest, though in many respects concurrent with that of the parties whose property he insures, is not altogether identical. Deck-jettison furnishes an instance of such independence. Though the original parties to a jettison of deck-cargo have to pay their quota, the underwriter upon his contract refuses to contribute towards this species of loss, whether he have insured the cargo itself, the ship or the freight,—unless his consent to the risk of deck-cargo has been given by a special clause in the policy. He objects to the danger of carrying goods above deck as an additional and unwarrantable risk; one not contemplated in the rate of premium he ordinarily charges.

Though the permissive clause is only occasionally introduced in ship and freight policies, yet with timber-carrying vessels it is so common to take a deck-load, that policies on cargo usually include a written clause expressing the underwriter's liability in respect of that portion of the cargo. Up to the present time the prevailing belief is that underwriters are not liable for jettison of deck-loads unless the policy contains an express agreement to that effect. That agreement is couched in the words "in and over all," or "on goods above and below deck," or "including risk of deck-load." It is, however, questionable whether underwriters have valid grounds for resisting jettison of deck-

cargo. The custom is so general in some trades that it cannot be ignored or held to be an innovation. We may recall Justice Willes' observation in *Johnson v. Chapman* * quoted above: "It is not suggested that there is any statute to make a deck-cargo illegal; therefore it seems something more than a custom to have deck-cargoes." If it were so detrimental to safety as is alleged, it would not only be excepted itself from indemnity, but the carrying a deck-load would discharge the underwriter from his contract generally. In *Cunard v. Hyde*,† the policy included the risk of deck-load. The vessel with a deck-cargo sailed on the 14th September, and without the clearing-officer's certificate. The defence of the underwriter was that the policy was void *ab initio*. The Court decided otherwise. The captain's offence against the Act of 16 & 17 Vict. did not make the voyage illegal so as to void the policy: and the distinction was drawn, incidentally, between the position of a shipowner or master guilty of an illegal act, and an innocent proprietor of cargo ignorant of and non-participant in such act. Underwriters have it in their power to escape from such a risk by not underwriting ships or goods in particular trades, or by charging an additional premium adequate to the augmented danger. On the broad principle of sacrifice for the general good they would seem to be liable in this respect. This view is confirmed by what Mr. Arnould has expressed, in his valuable work on Marine Insurance. He says: "But the most important exception (*i.e.*, to contribution) is that of goods *carried on deck*, which, as they tend to

* 19 C. B. N. S. 563.

† 1 E. B. & E. 670.

embarrass the navigation, are not contributed for, if jettisoned, unless they are so carried according to the common usage and course of trade on the voyage for which they are shipped. On proof, however, of such usage, they are contributed for, if jettisoned, like other goods; and no notice to the underwriters of the existence of such custom is necessary in order to make them liable; they being bound to know the usage of the particular trade. Thus, carboys of vitriol, timber on the voyage between London and Quebec, and pigs between London and Waterford, have been contributed for, after jettison, though carried on deck, an usage of trade being proved in each case, so to carry them." * He supports his statement by reference to the great French writers on Insurance, Emerigon and Valin, and by the English decisions in the causes of *Ross v. Thwaites*,† *Da Costa v. Edmonds*,‡ *Gould v. Oliver*,§ and *Milward v. Hibbert*.||

Park, whose authority claims our greatest respect, says clearly, goods lashed on deck, if sanctioned by usage, are entitled to a contribution in General Average. The mere fact of stowing goods on deck will not relieve the underwriters from responsibility, inasmuch as they may be placed there according to the usage of the trade, and so as not to impede the navigation, or in any way to increase the risk. He cites as an authority *Milward v.*

* *Arnould*, 3rd edit. 776. And see *Wright v. Marwood, The Gladys*, where the decision was against shippers who claimed cattle thrown overboard, in General Average. 1881, L. T. p. 297, and 72 Q. B. D. 62, C. A.

† 1 Park. MS. 23. Sitt. after Hil. 16 Geo. III.

‡ 4 Camp. 142; Chitty Rep. 227.

§ 4 B. N. C. 134.

|| 8 Q. B. 120.

Hibbert.^{*} In *Gould v. Oliver*,[†] during which trial reference was made to *Da Costa v. Edmonds*,[‡] it was held that as the stowage of timber on deck was sanctioned by usage the loss was properly the subject of General Average.

I am bound, however, to say that the underwriters do not take these decisions to be conclusive, or admit that the principle is yet settled. They claim the authority of *Miller v. Titherington* (Exchequer, 1863, and Appeal Ex. Chamber)[§] as upholding definitively that an underwriter on ship is freed from contribution to jettison of deck-cargo even in those trades, and during the seasons in which deck-loads are legally permitted; and now by the last amendment of the Merchant Shipping Act, as has been already stated, there remains no legal obstruction to carrying goods on deck.

GOODS SHIPPED ON DECK AT SHIPPER'S RISK.

When this clause is added to the clauses of the bill of lading, its intention would appear to be plain enough. The shipper or merchant seems to say: On your allowing me to place these goods on the deck of your vessel, I agree to relieve the master and owner from all responsibility as to their safety. Deliver them, if possible, at their destination; but if you cannot, if the goods are washed overboard, or jettisoned, or damaged, I am content to bear the loss of my merchandise, and, in like manner, you lose your freight on the missing goods. Such, apparently, is the contract. Yet its intention has

^{*} 8 Q. B. 120.

[†] 4 B. N. C. 134.

[‡] 4 Camp. 2 Chit. Rep. 227.

[§] 6 H. & N. 278, S. C. in Cam. Scacc. 7 H. & N. 954.

been questioned, and disputes have frequently arisen on the ship's liability under a bill of lading of this tenor. No decisive case at law had come before the Courts; but adjusters had pretty uniformly agreed in their practice about it. The nearest approach to an authoritative decision was given several years ago, by the Lord Mayor's Court, in the case of *Morwitz v. Wood*, but the case was not reported. At that trial the evidence given as to the customary meaning of the words, at least as interpreted by Average-adjusters, was overwhelming, and the verdict given by the jury, as directed by the Judge, has been generally acted on since.

In *Yglesias v. Micklereid*,* an application for a new trial was granted by the Lord Chief Justice. The principal feature in the trial had been that a custom also existed that when goods were shipped on deck—the bill of lading granting such permission—and goods were so shipped, notice is due of the fact to the shipper. This was met by another asserted custom, that *belmontine*, the subject-matter of the dispute, was always shipped on deck, being a dangerous article, and, consequently, did not require that notice should be given to the shipper. The Court set aside the verdict previously given for the plaintiff, the shipper.

The question, it was hoped, had been set at rest by the late case of *Burton v. English*.† The charter party contained the provision that the charterers, the plaintiffs, should, if requested by the captain, ship a deck-load of timber, such load to be carried at merchants' risk. The

* Q. B. D. 8th November, 1872.

† Q. B. D. in banc, 19th March, 1883. *Times* (the short-hand writer's notes confirm the report).

deck-cargo was thrown overboard, and the merchants, the shippers, requested the shipowner to adjust the loss of their wood as a General Contribution. This he declined, as against custom. Hence the trial, which was on a special case stated, for the Court. Mr. Justice Cave, in delivering the judgment of the Court, said that, as a rule of law, deck-loads are not entitled to contribution by way of General Average, unless there is some custom in the particular trade to the contrary. The Court held that the clause "at merchant's risk," referred to the risk of jettison. The Court were confirmed in their decision by the fact that the practice of Average-adjusters was as stated.

That practice has hitherto consistently been to exclude deck-loads from shipowners' responsibility altogether, where the bill of lading contains the clause "at shipper's, or at merchant's risk." *À fortiori*, the loss of deck-cargo washed overboard is excluded.

This judgment has, however, been revised. The Court of Appeal, on the 18th December, 1883, consisting of the Master of the Rolls, and Lords Justices Baggallay and Bowen, has decided that the words "at shipper's (or merchant's) risk," do not exempt the shipowner from liability to the merchant in case of the throwing overboard of deck-cargo; that is, it would seem, he is liable for contribution in respect of the ship and freight by way of General Average towards such jettison.

Thus it results that the terms of an express written contract in a charter-party or bill-of-lading, do not prevail against an ancient and well-known custom, or customary law—that of jettison. Were this the ground of the judgment of the Appeal Court, the decision would

be easily understood, even if it appears to reduce the value of a written contract or stipulation, held to be of first-class importance. To many, perhaps to the generality of minds, the subject presents itself in the following manner : A shipper desires to send away as much merchandise as he can by a given ship. He has liberty to place, at his own risk, some of his goods on deck, the shipowner not undertaking any responsibility for their safety or right delivery. It is a mutual convenience. The merchant is able to send a larger quantity of his commodity to market; the owner, to obtain an additional freight. Should *by any means* the deck-goods be lost on their way, the merchant loses the value of his merchandise, and the shipowner loses his freight. But this is not the manner in which the Court looked at the contract. The Master of the Rolls, in delivering judgment against the ship, did it on the ground that the master in throwing overboard the deck-goods acted as *the special servant of the merchant*. He was not on that occasion the servant of the shipowner; he was not even the general agent of both parties, but he was the alone servant of the owner of the goods; and as such, had a right to throw overboard his master's property, and by his act entitled the merchant to claim contribution from ship and freight for its voluntary loss. The doctrine will certainly appear new to the shipping world. They have considered that the master was especially, the owner's servant; *bailee* for all the property entrusted to his charge; and in case of emergency he was, *ex necessitate*, the agent and mandatory of all parties. It will not strike the non-legal mind that the master *quâ* merchant's servant can, because he sees fit to sacrifice his master's

property, acquire larger powers, and bind other interests, more strictly, to contribute to that loss than if the master, as servant of all parties and custodian of all the associated property, should from necessity, and for the escape from impending danger, throw overboard goods from deck, which by their very presence and incumbrance contributed to that threatened peril.

The foregoing remarks are made with the utmost respect for the very high authorities by whom the judgment was pronounced.*

Jettison of the entire Cargo.

The last point connected with jettison to be noticed is that alluded to in page 16. It is a rule which some writers have laid down that it must be *part* of the cargo thrown overboard which constitutes General Average; but that if *the whole* were so sacrificed there could be no ground for the cargo contributing, because *it* was entirely abandoned for the safety of the remaining interest. Now in practice we can hardly conceive a case in which the entire of the ship's cargo should be thrown overboard. I never heard of its being done. So that, practically, the doctrine is useless, and does not apply to real acts. But it is also wrong in theory. Suppose, by way of argument, that the whole of the cargo were jettisoned. Previous to that act being determined on, all the associated interests were in danger of being lost together.

* *Burton & Co. v. English & Co.*, Appeal, 18th December, 1883, *Times and Shipping Gazette*. More fully in Shorthand-writer's notes,

But a general saving may be effected by some voluntary sacrifice, and the cargo is selected,—not because it is intended to make that the scapegoat to bear the whole of the impending loss, but because the sacrifice of that portion of the co-adventure will be the efficient cause of safety to the rest. The ship is saved. The proprietor of the cargo would therefore demand of the shipowner to make good the value of his goods sacrificed for the selfish object of saving the ship. If the shipowner succeeded in resisting this demand, the whole loss would remain with the proprietor of the cargo. This is one horn of the dilemma. If, however, the cargo prevailed, and the ship had to make good the entire value of the goods, then the cargo would have been the only *gainer* by this voluntary loss. What then is the reconciling course which equity would point out? This—that the ship, the cargo, and the freight should each contribute, and so a similar position to that which existed before the jettison should be restored. All interests were at that crisis in equal and in imminent danger; a judicious act was performed by which a part only of the values was lost, and all the interests were benefited by it;—the ship being actually saved, and the cargo and freight constructively saved, in the sense of their being afterwards made good in value. All, therefore, must contribute to make good that loss; or, in other words, divide the loss between them, even to the totality of the cargo, if such a case can be supposed.

Remarks on Jettison.

It is not, however, every act of throwing overboard which should, in strictness, be called a jettison; for that term implies a subsequent restitution by contribution from other interests. Maude and Pollock* refer to *Mouse's case*, an ancient decision, "where it was held that passengers may, for the safety of their lives, and *navis levandæ causâ*, throw goods overboard without being responsible to the owners, and in which no question of Average, properly speaking, seems to have been raised." Nevertheless, jettison, as we understand the term, formed a portion of the Rhodian law, which law has become imperishable by being embalmed in the maritime judicature of other nations down to the present day. And Pardessus cites the letters patent sent by our Edward I. to the Cinque Ports, in the year 1285, specifying the valuables which were liable to contribute in case of jettison; of which the list appears more comprehensive than our own.

What has been already said of jettison as affecting marine insurance was incidental to the sacrifice of goods carried on deck, which stand in an exceptional position. The loss of goods below deck has never been doubted as being one covered by a policy of insurance: it is, indeed, one of the risks undertaken by underwriters which are specified by name in the body of the policy. Whatever difficulty arises on the side of insurance consists of a right in the insurers to claim that a jettison shall be apportioned as General Average on all the associated interests, thus relieving underwriters from part of

* *Compendium of the Law of Merchant Shipping*, p. 426, ed. 1881.

their loss. The fact must never be lost sight of that the contract of insurance binds underwriters to pay loss by jettison as one of the "adventures and perils" they are "contented to bear." It is the two-fold right of an assured who has had goods jettisoned, to claim on his co-adventurers and on his insurers, to the extent of satisfaction of his loss, that raises questions and difficulties. To make matters more complex, by the introduction of fresh terms, it has been suggested that General Average by jettison and other sacrifice of cargo or ship's materials is really Particular Average, and should be so called. This is a round-about way of expressing the assured's inalienable right to go to his policy: but it is very objectionable to confuse terms which are widely known, and which to plain minds describe and separate accustomed ideas.

A good leading law case was required to exhibit these rights; namely, the option of a merchant who has had goods thrown overboard to take his remedy against his co-adventurers, or against his insurers, they in the former case paying their quota of General Average. His guide in choice would be from whom he could recover the larger amount. Such a case presented itself in *Dickenson v. Jardine*.* In this case, a very large quantity of tea was thrown overboard. It happened that at the time of the ship's arrival at her destination a heavy fall in the value of tea had occurred, so that the market value in London was considerably lower than the value insured. The merchants elected to make their claim for their lost tea on their underwriters. These latter were at liberty to require that in a General Ave-

* 28 May, 1868, L. R. 3 C. P. 639.

rage, to be prepared, the market value of the tea on the arrival of the remaining portion of the cargo should be introduced as an item for contribution by the co-adventurers. Thus they would be recouped partially for the loss they had to make good. This judgment has never been reversed or disputed. Practically, the method of arrangement between assured and insurers is that the former receives from the shipowner, or whoever is the medium for paying and receiving, the market value of his lost goods, deducting therefrom what he has to contribute for General Average; and he claims from his underwriters that quota of General Average, and the margin or difference of price between the value of his jettisoned goods allowed in the Average statement, and their value as agreed in his policy. After this decision little remains unsaid on the relation of insurer and assured in the article of jettison; but it follows, that should the market price and the insured value be in reversed relation, and the price on arrival be larger than that insured, the assured would take his remedy against his co-adventurers, and only go to his underwriters for the proportion of General Average he is called on to pay.

Paramount Consideration of Human Life.

Although in discussing and legislating upon jettison and other acts of General Average we take into consideration only the values of the joint interests of ship, cargo, and freight, yet there is no question that self-preservation is the predominant motive for the sacrifices then made. This is so natural that no reference is made

to it in dealing with General Average, in adjustments. It is not, however, humanity alone which silently admits the saving of life to be the spring of action and justifies all the steps by which it is accomplished, for expediency, even, coincides in the same decision. It is plain that human agency is absolutely necessary for the preservation of the property with which it is temporarily associated; and that whatever steps, short of abandonment, are adopted to promote the safety of the master's and mariners' lives are also incidentally productive of advantage to the ship and her burthen.

Formerly, boat-hire and other expenses incurred in taking off the crew from a ship which they leave when in danger, and landing them, were rarely claimable in Average, even though the vessel be saved, and the crew afterwards return to her; but the judgment of Sir J. Lushington in the *Fusileer's* case,* entitled boatmen who first rescued the crew of a vessel in danger to rank with those who saved goods, &c. This decision commends itself not only to notions of humanity but expediency as well.

Ancient Discussions on this Subject.

I may add that the agitation of questions bearing on this subject is by no means confined to modern times. Cicero, in his *Offices*, quotes a passage from the Sixth Book of Hecaton's work of the same name, in which are discussed the respective rights of humanity and private property in the case of a ship in danger, when it becomes necessary to make a jettison.

* Br. & L. 341.

Having thus dealt with the subject of jettison, we pass on to the other heads of General Average Contribution.

Sacrifices and Expenses.

These consist of two classes, viz.—Sacrifices and Expenses. We will consider the former in the first place.

OF SACRIFICES MADE FOR THE GENERAL BENEFIT.

Conditions necessary.

As in the case of jettison, the sacrifice must be made deliberately, voluntarily, and with the object of saving or protecting the remainder of the property at stake. If some judgment be not used in the transaction, doubt and discredit will be thrown upon it, and a difficulty may arise in getting the parties interested to contribute towards the loss. Thus, a good deal of comment took place when the captain of an East Indiaman threw overboard a chest of silver plate, the value of which was enormously disproportioned to the relief afforded by its jettison. It naturally created suspicion about the *bona fides* of the whole affair, and even the truth of the statement. Nor may the articles sacrificed be those which would be lost immediately, if not abandoned or destroyed. There may be a few instances in which such a sacrifice produced a desired effect, but in general the inference would be that they were purposely sacrificed to save the owner a private loss of them from which there was no escape.

Then, a good deal has been said upon the necessity of fixing beforehand the exact objects and extent of the sacrifice to be made; and, also, it has been held that general contribution cannot be claimed in respect of *every* consequence of a sacrifice though admitted to have been primarily made for the common good. Whilst giving proper attention to all valid arguments, we should bear in mind that it is desirable in practical subjects such as the present, to avoid over-refined discussions, and endeavour rather to obtain clearness and simplicity. If we must err, it is better to do so by generalising too much than by splitting hairs. When, hereafter, the case of vessels purposely run on shore to avoid total loss, and of water poured down a ship's hatches to extinguish a fire on board come to be spoken of, we shall have occasion to return to the doctrine here referred to.

Of the Principle of Immediateness, or "Causa proxima."

Here will be a fitting opportunity for examining the weight of a dictum or maxim current in maritime law, that '*causa proxima non remota spectatur*,'—that the immediate or nearest cause of any loss is to be looked to in deciding its application, and not a more distant or anterior cause. The principle therein affirmed must not be pressed too literally; or frequently motive will be lost sight of in determining on whom the onus of a loss should fall. The sentence embodies a general truth: but maxims are dangerous things, and the one here quoted requires to be used with limitations. It would be quite as generally true to say that in General Average

we must look to the efficient cause, the *causæ causa*, of the loss as to the immediate or proximate cause.

When an expression, such as *causa proxima* once gets into currency as a neat and applicable form of speaking, it becomes echoed from mouth to mouth, and is used as if it were a first principle, the announcement of which is presumed to settle all disputes. It is indeed true that in some cases the immediate cause decides the incidence of a loss, whether it gives rise to General Average contribution, or to direct claims on policies of insurance. But in other cases, eyes must be blind when they do not perceive that the immediate cause, the *causa causans*, is very often itself the consequence of another cause, the *causæ causa*, and is but the last link of a chain of antecedent cause-effects which follow each other as closely as thunder succeeds lightning, and are as closely connected as the false keel is attached to the main keel of a ship. It is only ignorance which speaks of a man being killed by thunder; and we do not deny, when a vessel strikes the ground with her false keel, she strikes it with her keel. If the preceding cause—the *causæ causa*—is the *sine quâ non*, without which the immediate cause—the *causa proxima*—would not have existed, the latter is strictly an effect of the preceding cause; and the catenation is as complete as if (using physical terms) it were not a chain composed of links, but, instead, a solid bar.

It is not here, however, the intention to dispute the general relevancy of looking to the immediate cause of accident or sacrifice: a proviso is only being made against the universal application of such a rule.

Lord Chancellor Selborne delivering the judgment of

the House of Lords in the Appeal of the *Inman Steamship Company v. Bischoff and others*,* seven other law lords concurring with him, said, "The general principle of *causa proxima non remota spectatur* is intelligible enough and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent from the observations of Chief Baron Pollock in *Montoya v. London Assurance*,† and from *Boudrett v. Hentigg*.‡ Nor do I think that the question can entirely depend upon the difference between a condition precedent and a condition subsequent, by which it might be defeated."

It would be interesting to compare this reasoning with that which prevailed in a case of smuggling and subsequent capture, previously decided (*Cory v. Burr* §). The smuggling was the absolute and sole cause of the capture: but the Court held that the immediate loss (commuted by a fine) was produced by capture; and from capture the insurers were free by stipulation in their policy.

Loss of Anchors and Cables.

The voluntary loss of anchors and chains is one of the most usual of all the forms of sacrifice entailing general contribution. As such it rises first to our notice.

When a ship at anchor is in danger of driving on a

* 1 August, 1882, 6 Q. B. D. 648.

† 14 C. B. N. S. 286.

‡ Holt, N. P. R. 149.

§ Appeal, 1 July, 1882.

lee shore, during a gale ; or when another vessel riding in her neighbourhood is driven towards her, and a collision becomes probable ; or when in violent weather it becomes necessary to leave an anchorage, it being no longer safe to remain there, and it is found impossible to weigh the anchors ; or when to extricate a vessel that has got ashore, her anchors and cables have been carried out for the purpose of heaving her afloat ;—when in any of these and some similar cases the general safety is secured by slipping from or cutting away the ground-tackle, such loss is to be made good in General Average. The ropes or chains must really have been cut or slipped for that purpose ; and there must have been some reasonable expectation that their sacrifice would produce the effect desired and intended. Proper precautions should have been taken, also, for the recovery of the anchors and cables, by having buoys attached to them previously to slipping.

In making good anchors and cables slipped, it is the custom to charge the entire cost of the anchor, two-thirds the price of a rope-cable, and five-sixths that of a chain,—except when a ship is on her first voyage, when all are charged in full.

Exceptions.

There are two or three exceptions to claiming as General Average anchors and chains which have been cut, slipped, or unshackled. One such exception is the case of foul anchorage. When a ship in her ordinary navigation drops her anchor among rocks, or moorings of other vessels, and afterwards finds it impossible to weigh

it, and is in consequence obliged to unshackle the chain or cut the rope cable, the loss is borne by the owner; for the anchor and cable were in fact lost as soon as they were dropped,—just as much as if the cable had immediately broken. They were in a situation from which they could not be recovered, and so there could be no claim as for a voluntary loss. But, if a vessel is driving with her anchor down; or being in danger, she lets go her anchor and it hooks or drops into moorings, rocks, &c., and she is obliged to slip, then the loss becomes General Average. Or in case of a vessel fouling another ship's ground-tackle, and slipping from her cable to extricate herself,—if the anchor could have been recovered in ordinarily fine weather, but a gale coming on makes it highly dangerous for her to remain where she is and the cable is in consequence cut or unshackled, the loss ranks as General Average.

If an anchor by which a vessel is moored is lost during fine weather by the parting of the cable, the loss is denominated “wear and tear,” and is borne alone by the owner. It is an ordinary casualty to which vessels are liable. In fine weather and usual circumstances the chain, in this case, then hanging loose, would be hove on board again. But if after the parting the ship drives and is in danger, and the crew is too much occupied in other necessary manœuvres to heave in the chain, or if the chain by its weight lists the vessel dangerously on one side, the loss of the remainder of the chain by slipping it is, very properly, the subject of General Average. It is indeed difficult, or rather, impossible, to decide the length of the piece of chain so slipped, but this is one of those matters which must be left to the judgment of the

person charged with arranging the General Average Contribution, to settle.

The accessories of anchors and cables, such as buoys, buoy-ropes, and chains, follow as a consequence the loss of the tackle to which they belonged. So also does a hawser used as a spring on a cable in order to cast a ship's head round in a particular direction, and which is cut and lost when the cable itself is slipped.

The precaution should always be taken to have the anchors branded with the ship's name, to facilitate their identification in case they should be recovered. When anchors and cables are regained, after others have been bought to replace them, they are generally sold for the benefit of those concerned with their loss, and the net proceeds of their sale, after deducting the salvage and other expenses, go in reduction of the cost of new anchors and cables.

But if they are picked up previous to new ones being purchased, then the salvage and all expenses of the recovery are chargeable in General Average.

Anchors and cables are not the only tackle liable to be sacrificed in the moment of danger. Hawsers, warps, and other ropes are often lost, destroyed or injured in bringing a ship and cargo out of peril. In order to establish the principle of their being paid for in General Average, it must be shown that they were being employed at the time of their loss in a service which was beyond their ordinary use and intention. Warps and other ropes are put on board purposely to be used on certain occasions, and by their ordinary employment they frequently are broken and lost, and necessarily, in time, become worn out and unserviceable.

The difficulty is to distinguish where the ordinary use of a thing ceases, and when a service that may be called extraordinary commences. Experience and technical knowledge must be resorted to in all such cases of doubt. There is no question, however, that to take the ship's ropes when she is on shore in order to heave her off, moor her to rocks, &c., tow or warp the vessel into safety by steam or extra labour; or to divert them from their proper use in order to secure a rudder, to fish sprung masts, to set up jury rigging, or to prevent cargo that has broken loose in the hold from shifting about and injuring the ship's sides and imperilling the general safety,—is to apply them in a way not necessarily contemplated when they were put on board, and any loss or damage accruing to them by such use should be made good by the interests generally, since they were all benefited by it.

OF CUTTING AWAY RIGGING, SAILS, AND MASTS.

It not unfrequently happens that by a sudden squall, or some similar cause, a ship under canvas is thrown on her beam-ends, with her yard-arms and part of her sails in the water, and owing to the last circumstance, or from the shifting over of the cargo, she is prevented from rising upright again. To relieve her from this critical position, it becomes necessary to cut away the weather rigging, the sails, or the masts themselves. This is a loss which must be made good by General Contribution. The more imminent the danger from which the vessel is rescued by the cutting away, the greater the justification for such a sacrifice. In making

good the damages and losses the question occurs, What will be the just sum to charge the parties benefited? For the materials cut away may have been old and worn, whilst those by which they are replaced are generally new; and if so, the shipowner actually benefits by the accident in the improvement of his ship. This improvement by receiving new for old is sometimes called MELIORATION. There will be occasion to speak of this subject when treating of Particular Average on ships; and it will be sufficient to say here, that to avoid giving the owner the advantage of improvement, repairs coming under General Average Contribution have been placed on the same footing as Particular Average, viz., one third part of their amount both in regard to materials and labour being deducted. It is true that the assumption on which we proceed in making this invariable deduction is an arbitrary one. In many cases no advantage whatever is gained by the owner in consequence of the repairs effected, whilst there are other instances where the melioration is probably nearer two-thirds than one-third. It would be so inconvenient and so difficult to endeavour to fix in each individual case the extent of the benefit, or melioration, by repairs, which, as before mentioned, may vary from absolutely nothing to a very large proportion according to the age and wear of the ship and her stores, that practically, the deduction of a third is found an equitable rule, and is sanctioned by general custom. If, however, the sails, &c., cut away were quite new at the time of their loss, this rule is departed from, and the whole cost of them, without deduction, is allowed.*

* See *Aitcheson v. Lohre*, 4 App. Ca. 755 & 761; and *Pitman v. Universal Insurance Co.*, as justifying the custom of deducting thirds.

Sails, &c., sacrificed in another way.

A sail or other parts of the ship may be sacrificed without being cut away. A ship driving towards the shore in a gale or squall may have had her sails blown away by the violence of the weather, and it may be quite plain that any sail hoisted must almost inevitably share the same fate; yet it may be the ship's only chance of escaping from that lee shore, to set a sail or a tarpaulin in the rigging as a last resource, to try and wear her head round; and the purpose is sometimes answered if the sail, &c. so exposed, only last a few minutes or seconds. This is an unusual service of the ship's furniture, and must rank as a voluntary sacrifice. Great discrimination, however, must be used in deciding when a sail thus lost is to be made good by general contribution, which it is not entitled to be if its loss be caused only by an extreme degree of its proper use.

So, too, the use of sails hoisted to force a vessel off the ground when she is stranded, and thus destroyed or injured. This, also, is an extraordinary use of the sails; a course quite beside their intended application, and they should be made good in General Average.

For the same reasons, chains, hawsers, and anchors lost are to be allowed when let go because a ship under sail finds herself driving on to a reef or shore, and the attempt is made to bring her up all standing. The letting go the anchors at such a time is attended with the full knowledge of the extreme risk or, it may be, the certainty of their being lost, but, this full prospect of their very probable sacrifice, their momentary action

in casting the ship's head round may save both vessel and cargo, and is a voluntary sacrifice.

Any Stores diverted from their proper Use.

. And, in general, the diversion of stores or any materials of a ship from their original and intended purpose to some other use necessary but not contemplated, brings them within the class of General Average. So, sails used to cover the deck or hatches after an accident to prevent water going below, or hauled under the ship's bottom to stop leaks there; so, a hawser or ropes employed to support a mast or to secure a rudder; so, even, coils of new rope, being the ship's stores, used on any extraordinary emergency for the general safety of ship, cargo, and freight; so, ropes and other articles used for chocking and securing a cargo of iron or other heavy goods which has broken adrift in the hold and endangers the general safety, are all classified under this head. But if, when owing to straining, the decks have become leaky, and to protect the cargo below from the drip, sails are taken into the hold to cover the perishable merchandise, and are thus injured or destroyed, the case is different; the sole object of the sails being so used is to cover the cargo and prevent injury to it, and the loss or damage received by them is applicable to the cargo solely.

The loss of boats may likewise form a claim for General Average. It is true that their proper and ordinary duties expose them to risk of loss and damage, and their loss, or the repairs to them, can only be allowed when the boats are clearly being employed in work which

is extraneous to their intended use—such as carrying out anchors and chains, and heaving a ship off when she has been stranded.

Consumption of Coals.

In connection with steam navigation, obstinate questions have at times arisen as to the extraordinary expenditure of coals used under circumstances of difficulty or danger. The underwriter maintains that coals are part of the stores or apparel of the ship; that to use them when required is to make a proper employment of them, even though the increased expenditure be destructive of the owner's profits; that to use many coals is like using many sails,—those sails which are split or blown away being replaced by others, and yet form no claim on the insurer as *Average*; that an unintended increase in the consumption of fuel is similar to an unexpected addition to crew's wages, which, even when a vessel is detained under *Average* in a port of distress, are not chargeable to underwriters; that where pumps are kept going by steam-power, and even by a donkey-engine not connected with the propelling machinery, the coals burnt are not recoverable, because they are used conformably with their purpose, though to a larger extent; and that an insurance on a steam-ship contemplates the incidents and circumstances of steam navigation. And this argument is carried so far as to exclude the coals used in keeping donkey-engines at work to discharge cargo under *Average*, even though the manual labour of men hired for the purpose (unquestionably an item of *General Average*) would have been more expensive. The ship-

owner replies that the additional expenditure of his coals, or the necessary purchase of a further supply, is accidental and extraordinary, a circumstance not contemplated in the normal navigation of the ship, but the result of sea-perils; that his providence in having a supply on board is not to militate against him, and that the use of his coals to relieve all the interests when endangered by sea-perils is a diversion of them from their proper purpose, and an act of General Average.

Cases of this nature must be judged on their several merits; and there is a prevailing feeling, not only among practical men, but in judges and juries, that means taken to avoid losses and to extricate ships and cargoes when in danger should be encouraged, and that a captain's or owner's hands must not be weakened by throwing on the latter the whole burthen of an expense by which all the associated interests have been benefited. On the other hand, an abuse of the principle would grow quickly and easily if not checked; and the following case is valuable in helping to settle the limits of such claims. The action of *Wilson v. The Bank of Victoria** was brought by the owner of a ship, which had "auxiliary steam power," against a Bank for contribution in respect of gold shipped by them, towards the cost of additional coals necessitated by sea-perils. The vessel struck an iceberg, and was thereby so disabled that she could not be navigated with her sails, and had to rely on her steam-power. She exhausted her own stock of coals, and had to put into Rio Janeiro, and afterwards into Fayal to obtain further supplies of fuel, incurring an expense of nearly £1,500.

* L. R. 2 Q. B. 203.

In delivering the judgment of the Court, Justice Blackburn said that the shipowner was not entitled to recover the value of the coals in General Average. The extra expense could not be considered extraordinary, for the contract of the shipowner included the use of the steam-power of the vessel so far as it might be required; and though the disaster which occurred had caused the steam-power to be used to a much greater extent than ordinary, that did not render the expense, in law, an "extraordinary" disbursement, any more than the extra expense of provisions, &c., caused by the voyage being protracted through the ordinary accidents of navigation could be deemed extraordinary.

The foregoing judgment is important, because decisions on questions of General Average are not very frequent, and because it lays down authoritatively a very guiding principle—the distinction in expenses between what is *extra* and what is *extraordinary*. It is true that the meaning of the words is the same, the former being only a shorter term than the second; but under this legal sanction a difference is established between the two terms, and is to be taken to express the distinction between an increased or prolonged expenditure in its normal direction, and an expense or use for some purpose unintended but necessitated, and different to what was intended. The first class lies, as it were, parallel to and in the direction of a proper use, although prolonged or enlarged; the second class is at angles with it, or opposes it. And on this ground I have already referred to such uses and expenses as being either "incidental" or "accidental."

An exception is made when ship's coals are used to

move a ship about in harbour, to and from the shipwright's yard, &c. ; but this allowance is nearly always considered Particular Average. The question of extraordinary consumption of coals was much discussed in the case of the steamer *Nyanza*, which in the year 1870, whilst on her voyage from Glasgow to Bombay, was stranded, and the event became the subject of a General Average claim. A case was drawn up and was presented to four eminent members of the Bar, three of whom afterwards became judges. I give in an appendix the facts and the opinions of counsel, as stated by the Corporation for Protecting Commercial Interests, &c., shortly named the Salvage Association. See Appendix No. 1.

Consequential Damage by Masts, Spars, &c.

When it becomes necessary for the general safety to cut away masts, &c., and the spars in falling destroy the rails and bulwarks, injure the deck, and tear off metal sheathing, these consequential damages, following immediately the act of cutting away, are universally classified as General Average. But the wreckage of spars and rigging once in the water, any farther damage done by them, before they are disengaged from the ship, to her side or bottom is by many held to be chargeable to the ship alone, on the alleged ground that the latter damages, though having their origin in the voluntary act of cutting away, are not the necessary, immediate and intended consequences of that act. It is said by those who uphold this practice as consistent, that the wreck which beats alongside, though it may be almost impossible in the danger and turmoil of the moment to cut it all clear

away at once, or though, the attachments being cut, the wreck still clings about the vessel, becomes a new and independent sea-peril, and the damages it inflicts are sufficiently distant from the original act of volition to make them rank under the head of Particular Average. To a logical mind this view will not seem consistent or convincing. The primary act gives rise to a series of consequences—progressive links, but traceable to and depending on that first act. And it appears merely arbitrary to break the chain at any given point, and to make a new rule for the link beyond that point. If the ground of the practice be expediency only, and it be shown that it is highly convenient to draw a particular line of demarcation, that is another matter, and may not be objectionable. It may be advisable to stop short in the middle of a train of consequences when difficulties would arise in following them out to their extreme limits; but if so, it ought to be done simply *as a matter of convenience or custom*, and should not be attempted to be defended on other grounds.

Ship run on Shore when in danger of Sinking at Sea.

It not unfrequently happens that owing to damages received at sea, a vessel is in such a leaky state as to be in danger of foundering; in fact, must sink, in spite of every exertion at the pumps, &c., except she be prevented by one alternative—that of running her on shore. When the opportunity presents itself for effecting this that course is adopted. All the possible contingencies of injury to the ship in doing so are voluntarily incurred, it being the only means left of

saving anything. The soundness of the vessel is in this case the thing sacrificed. What exact matters that sacrifice may consist in, and to what degree the damage may extend, must remain to be determined afterwards, when by an opportunity of survey her condition can be ascertained. There is no difference between this voluntary act and others previously described, except that in the case now before us the precise amount of damages voluntarily entered upon cannot be determined beforehand. But neither can it be so determined in many minor acts of sacrifice; since the consequences of these acts frequently vary, and extend beyond the degree intended or anticipated.

Nevertheless, by our present practice, the damages to the ship incurred in this manner are excluded from General Average. The reasoning which supports this decision is curious rather than convincing, and serves to show how a very imperfect argument is sometimes relied upon and left unquestioned through a long series of years.

The two reasons put forward to satisfy us that this damage is not of the nature of General Average are, first, the indefiniteness of the injuries to the ship purposely entered upon by running her ashore. By this it is asserted that one feature necessary to General Average is lacking. But it has already been stated that in nearly all cases of sacrifice there is the possibility of the amount of it extending beyond the limits expected and calculated on. There appears no more difference than there is between the two cases of a person assisting a needy friend by a certain sum out of his purse, or by

his placing the whole purse at his disposal to take what is necessary.

The second reason assigned is this: that in the case of a ship about to founder being run on shore, her impending fate was *not probable*, but *absolutely certain*. Had she been left at sea she must have sunk; and the driving her on rocks or sands was a desperate measure, a mere "*sauve qui peut*," and that consequently any damage so incurred must be borne individually by the sufferer, and not be made good by general contribution.

In reply to this latter argument it is to be answered, that in all cases of General Average the rescuing the joint interests from threatened loss is the ground of the claim; and the more imminent the danger avoided, the more clear is the advantage gained through the means employed. If the dreaded destruction of ship and cargo seemed at the moment it was escaped an absolute certainty, the more cheerfully, it is to be supposed, would all the persons whose property has been saved join in reinstating the loss of the suffering proprietor. If I give my hearty thanks to the man who saves me from drowning, by snatching me out of the shallow water into which I have just fallen, are not my gratitude and rewards due in a yet higher degree to him who brings me on shore out of deep water, and when my life was on the very verge of extinction?

If the saving of a ship and her cargo, by some voluntary act, from a possible or probable loss be the ground of General Average Contribution, *à fortiori* it must be the ground of the same when the probabilities of loss have so increased as to amount to an almost certainty.

It is also to be observed that the writers who maintain the strictest view of General Average, holding the "physical safety" doctrine, state that the criterion of any act entitling it to be classed as General Average is the *certainty* of loss from which the associated interests were saved by that act.

The American practice holds the damages to a ship by voluntarily running her on shore to be General Average; and Mr. Willard Phillips states this to be the doctrine in the United States. There, the whole of the damages, both to vessel and cargo, caused in this manner are charged to General Average, the contribution to which, in some cases, almost equals a total loss to the contributors. The same practice obtains in Hamburg. In France, a judgment of the Court of Bordeaux decided damages to ship by a voluntary stranding to avoid total loss, to be General Average.

I would again refer to the collection of American decisions, which Mr. Lowndes has printed. The American Courts have gone so far as to say that when a vessel is driving on shore, and a better place for stranding can be attained, this preferential choice makes the case General Average.

Other legal views of this Subject.

Legal writers unite generally in asserting this species of loss to be General Average. Sir J. Arnould emphatically lays down that "where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be

made good by General Average Contribution. There is no rule more clearly established than this by the uniform course of maritime law and usage." And after quoting the corresponding dictum of Emerigon, he goes on to say, "The rule has been laid down in the same way by Lord Tenterden in this country, and by Chancellor Kent in the United States, where it has received the sanction of several decided cases." *

And Messrs. Maude and Pollock, after following Sir J. Arnould in his view, remark, "It will be observed from the cases cited above, that the claim to contribution may extend to collateral damage necessarily connected with the main injury which forms the subject of General Average." †

In spite, however, of these opinions, which in themselves and from their accessories are of much weight, a different rule prevails in practice, and each of the co-adventurers is made to bear his own loss in cases of voluntary stranding. This practice is based on expediency and convenience, not on a consistent doctrine. The question will probably come forward for legal solution ere long.

Damage by Press of Sails.

A ship driven by wind or currents on a lee shore is frequently extricated from her threatening position by a bold and lavish use of her sails. An immense pressure of canvas is put on the ship and she is steered clear of

* *Arnould, Marine Insurance*, vol. ii., 784, 3rd Edit.

† *Maude and Pollock, Compendium of the Law of Merchant Shipping*, p. 429, Edit. 1881.

the land, but very frequently with loss of or damage to her sails and rigging. This kind of sacrifice presents difficulties, and it has been pretty consistently rejected from General Average. It is exceedingly hard to draw the line between duty and sacrifice ; and to show in the use of a thing the point at which, by mere excess, the use passes from proper but extreme employment to one exceptional and unintended, and which should form the ground of a General Contribution. When Mr. Stevens wrote his "Essay on Average," upwards of fifty years ago, he inclined to the opinion that if sails so lost were to be recovered by the shipowner, they should rather form a claim of particular Average on the ship's policy than one of general contribution. The actual ground of our practice, however, in rejecting sails blown away from Average, is rather that of expediency in avoiding difficulties and uncertainty than consistent principle ; and an extreme case has already been mentioned, where a sail is deliberately sacrificed by being set to produce a momentary effect, in which such beneficial loss is properly chargeable to General Average.

Damage by throwing Water down the Hatches.

The last species of voluntary sacrifice to be named here, relates to damage done to goods in a ship's hold by throwing water down the hatches to extinguish a fire.

Here, again, an act is performed manifestly for the common good. Either the fire must be extinguished, or a total destruction of ship, cargo, and freight will ensue. The means taken to rescue the conjoined interests from that destruction damage a portion of the cargo—one of

the interests. This damage then, it follows, should be made good in General Average.

Since the last edition of this Handbook, the principle of damage to sound cargo, and also to ship, by throwing down or otherwise admitting water to the hold, and cutting through the decks, &c., to introduce water, has been definitely settled by law. The leading case of *Stewart v. The West India and Pacific Steamship Co.*, was tried in 1872, and affirmed by the Exchequer Chamber the following year.* Other cases have come forward; As *The Whitecross Wire and Iron Co. v. Savill and others*,† in which the law is confirmed, and which introduced another point, viz.: that the end of a voyage, *quâ* the ship, is not the end of the adventure as concerns the owners and underwriters of cargo; for in this case the ship had reached her port of destination, and had remained three weeks alongside the wharf before the fire occurred. *Pirie v. The Middle Dock Co.*,‡ defines another branch of the main question.§ Shortly, the matter stands thus:—If cargo in a ship's hold, or, indeed, if the materials or stores of the ship itself, are on fire, or are heating to the degree that will end in com-

* Q. B. November, 1872, L. R. 888 ; affirmed June, 1873, Ex. Ch. R. M. C. p. 32.

† Appeal 28 March, 1882 ; 8 Q. B. D. 653 ; & J. 426, Q. B.

‡ N. P. 4 April, 1881 ; Q. B. D. L. T. 1881, Vol. 44, N. S. 426.

§ It was this : Combustion had taken place in a cargo of coals ; water was thrown down to extinguish it. The jury found, or assumed, that one-half of the cargo had not been on fire, and had been damaged by water alone. The loss on this portion was, consequently, claimable as General Average. It should be stated, however, that it was not the damage of cargo but the loss of freight which was the subject of this trial. No pecuniary loss was shown on the coals themselves.

bustion, and water is introduced to extinguish the fire or prevent the approaching ignition, the damage caused by the water to ship or goods, or both, is claimable in General Average. So are damages to the ship's deck, her hose, utensils, &c., caused incidentally by the operations for saving the joint-interests from this impending destruction.

There are, however, limitations. Goods and ships' materials, which are already on fire, and, especially, if they are themselves the cause of the fire, cannot claim to bring their injury into Average. So, too, when in a case of burning, the inspection of surveyors decides that some things are damaged by fire and water, no claim can be made in respect of them; for the fire must have preceded the water-damage.

Nor must it be supposed that there is not cogent reasoning against bringing this so-called voluntary damage into General Contribution at all. It has been earnestly contended that voluntariness is wanting, and that the effect of quenching with water, is merely stopping a partial destruction or injury from becoming total. Such reasoners look upon the process as one which limits a Particular Average, and prevents in the individual case, a partial loss growing into a total loss.

So in the cause of *Pirie v. The Middle Dock Co.*,* a new feature presented itself; that of an uniform cargo being on fire in one part but not yet in another, though believed, by the heat of all parts, to be progressing towards a general ignition. This cargo was coals, but the same reasoning would apply had it been wood, cotton, &c. The case was peculiar because, as men-

* Q. B. D. L. T. 1881, Vol. 44, N. S. 426.

tioned in the preceding foot-note, no claim was put forward for damage to the cargo, but was confined to the freight. The arguments generally would have been equally available, had a claim been preferred in respect of the coals. The decision, which classed the monetary loss as General Average, seems to be based on the assumption that part of the cargo was safe, though another part was burning; but all the coals, where tried, were hot. It is to be remembered that the cargo consisted of one article; and the test of the non-ignition of one end of a uniform cargo might possibly be applied to a case of goods, one end of which is on fire but the other, at the time of applying water, is so far in safety that it has not been heated. Leaving ingenious comments we are now able to say that a troublesome question has been settled, so far, by law.

Ransom and Composition.

If a merchant vessel be captured by a public enemy it is not allowed, for national considerations, to ransom her: consequently a sum of money paid for the ransom of the whole co-adventure could not be recovered from the several parties as General Average in a court of law or equity. But the same consideration does not apply to a pirate or private marauder; and, therefore, money or goods given to the captor by way of composition to effect the release of the vessel and her cargo is properly claimable by General Contribution. This item of average seems, strictly, to apply rather to sacrifice than to expenses, and it is accordingly mentioned in this place.

The commentator on the French code draws no distinction as to the character of the captor. He says: "The captain in case of capture has a right to ransom the ship and cargo;" and, "It is evident that each person profited must consequently contribute in proportion to the advantage he has gained." He adds: "It matters not whether the ransom has been effected in money, commercial value, in provisions, or in merchandise forming part of the cargo." *

But in a case of smuggling by the shipmaster,† and subsequent capture of the vessel, and a sum of money expended to extricate the property, it was held that the immediate cause of the loss was capture and not barratry, as pleaded. This will be spoken of farther on.

OF EXPENSES INCURRED FOR THE GENERAL BENEFIT.

The same test will apply to expenses as that by which sacrifices are decided; but the application is not in all cases so clear or the result so unquestionable as could be wished. We shall have to point out some anomalies sanctioned by long usage. Errors of old standing clothe themselves with authority: and it is always difficult to eradicate a fallacious custom or opinion endeared by long familiarity.

Assistance to a Ship in Distress.

Assistance afforded to a vessel in distress is an obvious subject for General Contribution, whether it be required for taking her into a port of refuge during a storm, or to

* *Bedarride Com : Code de Commerce*, Titre XI., sec. 1682.

† *Cory v. Burr*, appeal 1 July, 1882.

effect repairs when disabled, or for getting her off the ground when stranded; for pumping; for helping an exhausted crew in the ordinary manœuvring of the ship; for carrying off anchors and chains, and other necessary supplies from the shore to the vessel; or for giving additional strength to a crew, so that they may continue the intended voyage, when the alternative would be to incur greater expenses by refitting, &c., in an intermediate port.

Passengers' Services.

If a ship having passengers on board spring a leak, or from some other cause require assistance by additional hands, and the passengers be employed to pump and aid in navigating the vessel, the sums paid to them for their labour are treated as if the aid given were that of strangers.

More generally, however, in times of danger passengers gladly give their services gratuitously.

Crew's Exertions.

The ordinary crew of a ship are not to be paid an additional sum for their extraordinary exertions, because it is their bounden duty to make their utmost efforts for the preservation of the ship and the prosecution of the voyage:—and to reward men for doing their plain duty is an immoral act having a very bad tendency. If seamen found that in the hour of peril they were able to strike a bargain with the master for their services, the very worst consequences would ensue. There are a

few exceptional cases where the judgment of the Adjuster must decide whether the circumstances bear out some additional payment to the crew:—as, for instance, when a ship in a disabled condition puts into a port where leak cannot be stopped, or where repairs cannot be effected without very heavy expenses, and it becomes highly desirable to reach, if possible, the place of destination, yet the Consul is of opinion that the ship's company cannot *be forced* to go to sea again in the vessel's then condition;—in such a case, if the offer of additional pay and an allowance of additional victuals and spirits prevail with the crew to proceed on the voyage and to redouble their exertions, the successful result of such an arrangement would justify the proceedings, and the parties interested would scarcely object to a payment productive of so much advantage to themselves, and only questionable on mere theoretical considerations. The question of extra work by seamen in a port of refuge depends greatly on the ship's articles signed by them.

Salvage.

When the situation of a ship is dangerous in a high degree, and the fear of her loss is very great, the services of extraneous persons who rescue her from that peril, who drag her off rocks, disentangle her from surrounding sands, or who save her from sinking, are regarded in a different light from mere *assistance* which is to be paid by the man, by the tide, or by the hour,—and such services go under the name of *salvage*. When salvage services to a ship and her cargo are paid

for in one sum, in accordance with a previous agreement or a subsequent compromise, by an award of referees, by the arbitration of magistrates or commissioners, or by the decision of the Admiralty Court, that amount is frequently allowed to form an item of the general contribution, and is divided on the same values as the other common expenses. But if special valuations of ship, goods, and freight were made by or for the arbitrators, Admiralty Court, &c., for the purpose of coming at a decision, it is the better plan to adhere to those valuations in dividing the salvage. And if the arbitrators, &c., specifically name a separate sum of salvage to be paid on each of the interests, those sums should, in most cases, remain undisturbed and separate in the adjustment. These remarks must, however, be received with reservation ; partly on account of the manner in which freight is valued for contribution ; and also because in Admiralty awards the Court does not take notice of the freight separately,—it being considered as forming part of the value of cargo, whilst in common law it is held to be an incident of the ship. There are also great inequalities in the methods of valuing ship and cargo, or obtaining their values : and for these reasons a re-adjustment of the salvage awarded is often proper and necessary.

In consequence of services coming under the name of salvage being paid, *co nomine*, at a higher rate than assistance not so denominated, we commonly find attempts made to elevate labour and aid of ordinary character to that name. So, too, the term “wreck” is seized upon and applied to vessels and other objects improperly for the same purpose. In *Palmer v. Rouse*,

1858,* some rafts of timber moored in a river broke away and drifted out to sea. But the Court held that the timber was not “wreck,” so as to entitle to salvage.

When the crew of one vessel rendered services to another vessel belonging to the same owner, and the services were not within the terms of the ship’s articles or agreement with the crew, the Court of Admiralty allowed the crew’s claim.† And still greater is the crew’s right to remuneration where the cargo saved or assisted belonged to proprietors outside the adventurers in the ship which rendered aid. But in the *Maria Jane’s* case, the decision looked the other way. There were circumstances incident to the African trade that, in Sir J. Lushington’s judgment, took away the right of salvage, generally, from the assisting ship.‡ The fact that services can claim only the name of *towage* and not of *salvage*, does not exclude them from General Average. §

Expenses going into Port.

If a ship is forced by accidents or some necessity to resort to a harbour or port for refuge, repairs, &c., her expenses in going there and entering the harbour are General Average. These consist generally of pilotage, boat-hire, harbour and light duties, quarantine and health dues, use of warps and tackle, getting her into the harbour and mooring there, wharfage, custom-house

* 3 H. & N. 505.

† *The Sappho*, Privy Council appeal from Adm., June 15, 1871, M. L. C. 65, and L. R. 3 P. C. 690.

‡ *The Maria Jane*, 14 Jur. 857.

§ *Ocean Steam Co. v. Anderson, Tritton Co.*, Appeal 21 Dec., 1883. *Times*.

entries, telegraphic messages, and the like. But if the vessel only go into port in consequence of contrary and foul winds, her expenses are not considered General Average charges but merely expenses incidental to ordinary navigation, and for which the owner alone is responsible.

An addition has now to be made to the above description. In *Attwood v. Sellar*,* the decision of the Court was that where, owing to an act committed at sea which was itself an act of General Average, the vessel was under the necessity of putting into an intermediate port, and there had to discharge and warehouse cargo and repair damages, the whole of the charges for landing, store hire, and re-loading of cargo, together with pilotage, assistance, &c., both of entrance to the port and exit therefrom, are claimable as General Average. This decision commends itself as reasonable, as far as it goes; and we have ourselves always suggested the propriety of looking (with all foreigners and Americans) at the whole operation of refuging in a port and leaving it, as constituting one connected and necessary act. It will be observed, however, that the judgment in *Attwood v. Sellar* covers only part of the ground. Suppose that the necessity of resorting to a port arises from some fortuitous accident, and not from an act of volition—in other words, a General Average act—but still one which places the vessel and the other associated interests in danger. It has been held, hitherto, in this country, that the expenses of going into a port, discharging there, &c., are General Average, but that community of risk, and so of liability, stops when the cargo is deposited in

* 4 Q. B. D. 342; 5 Q. B. D. 286.

store; and then subsequent charges apply specially to cargo itself and to freight. To bring this customary manner of dealing with such charges, as practised in England, before the Courts, the cause of *Svendson v. Wallace Brothers** was heard. The question took the threefold form of—whether there was a mercantile usage; whether that usage, if proved, was against law; and what that contrary law was, if discoverable. Mr. Justice Mathew guarded himself from being supposed to pronounce any opinion upon the law.

Survey.

If the ship be injured, or supposed to be injured, when she enters a port of refuge, in nearly all cases a survey is held on her arrival there by competent nautical men, who recommend, after their inspection the course necessary to be pursued; whether to discharge the cargo, repair damages, or continue the voyage in her then condition. This first survey regards the collective interests, and is, therefore, General Average.

Discharging Cargo.

If the vessel have sprung a leak or have injured her keel or bottom, and it becomes necessary, in order to get at the damaged part, to discharge the cargo, the labour of discharging is General Average. So are lighter and boat hire with the goods to the shore, cartage of them to the warehouse, or other place of safety; the labour taking them into the warehouse, the pay of custom-house

* 4 Asp. M. L. C. 550, June, 1882.

officers attending the discharge and warehousing, police or military guards, metage from the ship, use of tackles, planks, baskets for discharging, &c. If the cargo be kept in the lighters instead of being landed, some portion of the lighter-hire is usually applied to General Average ; for it is considered that to hire lighters instead of a warehouse on shore is a more expensive course ; while on the other hand the increased expense of transit from the ship to the shore and warehouse has been saved, and an equitable compensation is frequently made for it by the Average Stater. There are, however, ports where lighters are the customary or only place for storing discharged goods ; and there are places where the lighter-hire is as expensive as store-rent.

Agent's Commission and Expenses.

When a merchant or agent in a port of distress makes the disbursements, he charges a commission for advance of funds. This is applied as a percentage to all the columns in which the expenses are arranged in the adjustment. His travelling and other small expenses usually belong to General Average. The agent very commonly adds a charge for his trouble and attendance, his general supervision of the business, correspondence, &c. ; which charge is most frequently placed to General Average in one sum. The quantum of this remuneration, varying as it does in different ports and with different agents, is a frequent cause of discussion. In some places a small banking commission on payments is usual and admissible.

Documents.

The expense of noting and drawing the ship's protest, either by a notary public, a tribunal of commerce, by the consul, or a magistrate; the captain's deposition before the receiver of wreck; stamps, certificates, oaths and attestations, duplicate copies of papers and the like, are classed under the same head. So also, generally, is the cost of the Average statement and translations, fees for collecting the value of cargo, &c. In some foreign places and in America the person who collects the Average frequently makes a charge in form of a commission for so doing, but this is not allowed by our usage. The reason given for its exclusion in England is that the subject-matter of the claim ceases with the adjustment of the Average. It is not clear, however, that this assertion is a valid one.

Charges when a Ship is a Wreck, &c.

There are also some charges incurred after a ship is stranded, or is in such a situation as to render it certain that she will never complete the voyage she is on, and so is to all purposes a wreck, which still partake of the nature of General Average. Although, generally speaking, the wrecking or stranding of a vessel breaks up the adventure, and so dissociates the interests, yet the expenses alluded to do not apply separately to the several interests, but are to be divided over them, *ad valorem*. Thus salvage services; attempts, though ineffectual, to get the ship off; watching; the general

attendance of Lloyd's agent and other agents; documentation, and other expenses intended for the whole property without exception, are to be thus divided. It is not that there is any longer a bond of union among the several interests,—for that is now destroyed,—but because this is the best manner of applying the charges to the various interests. And there are charges which do not seem to apply, at first sight, to more than one of the interests, perhaps, which on further thought will be found to have a proper applicability to the whole of them collectively. The discharge of cargo from a wreck lying on the rocks may seem to be a step taken only with reference to the individual benefit and safety of the cargo itself, and one towards which the ship could not be called upon to contribute. But if it be that it is impossible to get the ship off, or rather, to get the wreck away from the rocks whilst encumbered by the cargo remaining in her, or if the weight of the cargo renders it probable that she will be broken to pieces where she lies, it is plain that the ship does really participate in the benefit of measures which were primarily undertaken for the salvage of the cargo. So again, the cutting away a ship's masts when she is a hopeless wreck may be very advantageous to the cargo in preventing the rolling of the vessel on the rocks, which would hasten her utter destruction and the loss of everything on board; and cases present themselves where it is equitable that the cargo should contribute towards the damage thus done to the ship.

Wages of Crew when detained to claim Ship and Cargo, &c.

Although it will be seen hereafter that by English custom the wages of the master and crew are not generally chargeable in General Average, there is one case in which they are rightly admitted; and that is, when a ship having been captured or detained in a foreign port, it is necessary for the master and some members of the crew to remain with her for the purpose of making and substantiating a claim for her restitution together with the release of her cargo. But if the ship be only detained under an embargo, the wages are not allowable and remain at the owner's charge.

And so after collision, when all parties would be relieved from expenses and loss if the vessel doing the damage be made to pay for it, it may be well to retain the crew, or part of them, as witnesses, after the voyage has been completed and the owner ceases to be any longer bound to keep a crew on board, to substantiate the claim for reparation. Here is a valid ground for charging the wages, &c., generally to the parties benefited.

Compensatory and Substituted Charges.

Sometimes the General Average expenses which would have been incurred are not entered upon, owing to some arrangement which may be economical to all parties concerned but by which the transaction is cut short; as either by selling the ship or the cargo, or by breaking up the voyage. In such a case these frustrated

expenses may well be taken into account in making an equitable adjustment among all the parties concerned: and an estimate, or *pro formâ* statement, may give compensation to the one party upon whom primarily the loss falls.

So too, when to lessen certain general expenses some course is taken by which, virtually, the expense is thrown upon one of the contributing interests, it is quite agreeable with the spirit of these settlements to divide and thus equitably to adjust the charge.

Thus, for example, at Malta and some other places the hire of warehouses on shore is exorbitant in price, or warehouse-room is difficult to obtain; and it becomes an easier and less expensive method to discharge cargo into covered lighters and keep it there. As a general rule it costs more to employ lighters for stores than to use warehouses on shore, but in some ports the former course is advisable. By not sending the cargo on shore a greater expense is avoided (that of landing and reloading) than arises when the merchandise is only put into and taken out of the craft. It is customary therefore, in adjusting, to divide the large expense of lighter-hire, and consider a portion of it as equivalent to the increased expenses of landing and reshipping which might have been incurred if so determined on; and thus to charge to the cargo specially, a sum representing warehouse-rent only. There is, however, no propriety in so dealing with store-hire if it can be shown that the rent of warehouses on shore is as great as that of craft afloat.

So too, when a ship has put into a port, and requires repairs, where they are known to be expensive and

tedious, and would require the discharge and storing and reshipping of the cargo, it is sometimes a means of saving to all parties concerned in ship and cargo that the vessel should be towed to her destination without incurring such charges, and without delay to the cargo, which may be perishable, or have a value dependent on season, &c. If the cost of towing, or of taking extra hands on board for the run, can be shown to produce a saving as against the alternative course, it is equitable that the towing, &c., should be looked on as a substituted expense, and should be apportioned upon the charges and losses avoided, which can generally be estimated. Such a method of dealing with substituted expenses resolves itself into an economical composition, beneficial to all the co-adventurers, and generally to their insurers.

Cutting through Ice.

A vessel becoming ice-bound or caught in a drift of ice, and being thereby in danger, when relieved from her situation by the assistance of men cutting the ice and bringing her through to a harbour or clear water, the expense of so doing is to be borne by General Contribution.

The cutting through ice in more ordinary circumstances to enter or go out of harbour, was formerly classed as *Petty Average*, and the shipowner and proprietor of cargo paid it between them without reference to their underwriters. But latterly there has been a tendency to look upon this expense as more nearly approaching extraordinary assistance: and, if attended by any accessory circumstances of danger, it has been allowed as General Average.

Where a ship, in the Thames, was by her own negligence run down, and was afterwards, with her cargo, raised by the Thames Conservancy, her owner could not recover the share of expenses falling on the cargo ; the work of the Wrecks Removal Act not being in its nature General Average, and the damage occurring by the sunken vessel's own fault.*

OF CERTAIN DOUBTFUL, UNSETTLED AND REJECTED
SUBJECTS OF GENERAL AVERAGE.

Wages of the Master and Crew.

It is in the particular of wages and provisions for the ship's company during the time she is under Average, that the English custom differs from the American and from nearly all foreign usage. As soon as a ship's head is diverted from her proper course for the purpose of going into a port of distress, and until she has regained her homeward direction after leaving port, the wages and provisions are by foreign practice chargeable in General Average. We reject this expense on the ground that an owner is bound by law to keep his vessel manned until she has completed her voyage, and that therefore he has not the option of dismissing the crew. All that can be said is that the protraction of the voyage is an unfortunate circumstance for the owner, but that he has not a remedy ; that protraction may be equally unfortunate for the proprietors of the cargo, whose goods, if perishable, may be much depreciated by the delay ; and they may lose their market from the same cause. Foreigners and

* *Prehn v. Bailey*, M. L. C. 1882, Vol. 4, pl. 6, 428 and 465.

some of our own colonists do not see the subject in the same light, however, and claim the wages and victuals in their adjustments. Many of our own insurance clubs have followed their example, and permit by their rules the wages of ships under detention to be allowed in the Average, and they even arrange a scale *per diem* to remunerate the owner whose ship is detained. Although a vessel be unfortunately detained in some port all the winter, ice-bound, the owner has no remedy against his underwriters, and has still less claim for contribution from the co-adventurers, since there is no voluntary sacrifice on his part, but an inevitable necessity. The only question that can arise in the case is, whether this position is altered by a ship being ice-bound in a port where she has been obliged to put in by circumstances which make her expenses going there General Average. The answer is in the negative; for neither by our law nor custom does detention, with the one or two exceptions I have mentioned, give any claim by which the owner can shift his burden on to others. The exception which Mr. Benecké proposes seems, rather, a distinction without a difference.

Parts of a Ship used for Fuel.

Before the whaling trade of this country in the North Seas was almost entirely abandoned, it frequently happened that ships were caught in the ice and remained fast-bound prisoners all the winter. Not always being prepared for this contingency, the crews were often put to serious inconvenience and suffering from want of fuel. When everything in the way of firing had been consumed, they were driven to make use of spars, boats, and

other materials to burn. It has been much discussed whether these do not legitimately form a subject for General Contribution. The lives of the crew would in all probability have been lost without this sacrifice, and the loss of the ship would in general have followed the loss of the crew, whose lives therefore, even on the most sordid principle, it was important to preserve. But to persons most conversant with these questions the case does not appear to be made out sufficiently.

The immense increase of steam navigation during the last dozen years has brought the subject of using the combustible parts of a ship, and also the cargo she is carrying, for fuel, when from detention, such as occasioned by breakage of machinery and other injuries, violent contrary weather and the like, her stock of coals is exhausted, or nearly so. No doubt, if the grounds for such a claim can be satisfactorily established, the sacrifice made for keeping the furnaces going falls into the category of the subjects compelling General Contribution. Those grounds are the practical difficulty. It must be shown that a steamer has been supplied at her last port not only sufficiently but abundantly with fuel for the ordinary duration of the voyage on which she is bound. It should also be shown that in estimating the length of such voyage, due allowance has been made for bad weather, contrary winds, and, at times, for inferiority of fuel supplied. Opinion abroad, decides that a steamer should take half as much again of fuel as the estimated consumption for the given voyage. Twice as much is the required quantity elsewhere. Unlimited fuel is the rule in one view ; but this means that no claim arising from deficient

fuel will be allowed in Average. Indeed, as steamships are built, they are incapable of carrying such a great surplus of coals in their bunkers; and there is the inconvenience, if they could do so, of a steamer leaving port very deep in the water.

It cannot be denied that contributors to this class of sacrifice have a great objection to them, sometimes mixed with suspicion as to their validity and the facts and computations on which they are based. In their estimate of human nature, they think that a facile acceptance of such claims induces steamship owners to put on board the minimum quantity of fuel and trust to the chapter of accidents. The adjuster is required to use all vigilance before ranking them in his Average Statement.

Little light can be gained from case-law on this subject. In *Harrison v. Bank of Australasia*,* where some spars were burnt to keep the donkey-boiler going, the Court were divided whether this afforded a claim for General Average. In the later case of *Robinson v. Price*,† the burning of some spars and cargo was allowed, on the ground that there had been a reasonable supply of coal.

In such delicate positions, the equities of all parties require to be much studied. Exactness in adjusting demands that if extraneous fuel serves instead of coals, allowance should be made from the value of the things burnt for the cost of an equivalent of coals, which have been saved by the sacrifice of other objects. Some of the mutual steamship insurance clubs have added to their rules a clause to the effect that when ships' materials or cargo are used for fuel a deduction shall be

* L. R. 7 Eq. 39. (The Court was divided.)

† 2 Q. B. D. 91, 295.

made from the amount charged for them of *twice* the cost of coals for which these articles were substituted ; and the price of the coals shall be that at the last port of departure.

Cutting away Things already Lost.

Though to cut away parts of the tackle and apparel of the ship for the common preservation and by a deliberate choice is a most obvious ground for General Contribution, yet there is a cutting away which is not applicable to General Average. The great principle of looking to the *primary cause* of every act is the safest guide to direct us in the matter. If, therefore, a mast be carried overboard with the sails and rigging attached, and those objects might have been recovered and saved, but that it became necessary, to prevent the wreck injuring the ship's sides and bottom, to cut the whole away, the loss of the sails is not the subject of General Average. The original cause is the accidental loss of the mast ; and although the loss of the sails and rigging was made absolute and complete by the act of cutting away the wreck, the true nature of that loss must be looked for in the original incident, and the cutting away afterwards must be considered only the consummation of the inchoate act. So, too, when sails have been split by the wind, and in order to get free from them quickly and prevent their injuring the masts, &c., they are cut away, the first cause of loss is to be considered ; and the completion of their destruction, though voluntary, is a matter of mere prudence, hastening the entire loss of that which would be inevitably lost without the step

taken, but in a less expeditious and in a more dangerous manner.

So, too, a boat, or other article, broken adrift by the sea and beating about the deck, and thrown overboard because it is impossible to secure it again, is not General Average. The act is prudential but not elective, and so not entitled to General Contribution. It should be added that there are some exceptional cases which, approaching the circumstances mentioned, tend more to voluntary acts than simple necessary measures, and may properly rank with General Average. And there are a few instances where some division is capable of being made in the cost of the thing sacrificed, a part being carried to General Average, and a part applying to owners or underwriters.

Some foreign adjusters are inclined to take a more liberal view than ours, and charge a part, at least, of the value of the articles cut away against the contributaries. We must go so far towards the reasoning on which this practice depends as to admit that all value deliberately and voluntarily sacrificed for the general good should be restored by general contribution; but two questions arise in respect of wreck lying alongside and attached to the ship—what is the assignable value of such materials in such a situation; and what is the prospect or possibility of their ever being got safely on board again, if they should not be cut away. In the great majority of cases the answers to these questions will be, that the monetary value of the wrecked materials is very small, and that the chances of getting them safely on board again are next to nothing. Our own practical course in the matter is consequently justified. The result will depend on the merits of the

case ; the investigation of which will be the office of the Adjuster.

Ransom.

It has been already mentioned that a sum of money given to an enemy by whom a ship has been captured is held not to be admissible as General Average. This is excluded on the grounds of patriotism and national expediency, and not because it is inconsistent with the principles of General Average.

A similar idea does not prevail in France. By the *Code*, ransom, "*rachat*," is classed, without limitation, as General Average.

Defending a Ship against Enemies.

Nor are the damages received by a vessel whilst defending herself against an enemy claimable as General Average ; nor the cost of the ammunition expended ; nor the expense of curing the wounds of the crew so engaged. The grounds of this conclusion are not very clear ; nor why a merchantman, casually obliged to take arms to defend itself, should be less entitled to compensation than a regularly armed vessel. One would be rather led to the conclusion that a goods' or passenger-carrying ship whose trade was not war, when suddenly put on its defence should be allowed to claim its losses, damages, and expenses of every kind even upon patriotic grounds, and as an encouragement to owners, masters, and seamen, "to labour in and about the defence, safeguard, &c., of the goods, merchandises, and ship, &c.," as

specially mentioned in the body of the Policy of Insurance; and also because this employment of extraordinary stores, provided only for such a contingency of violence, appears perfectly analogous to the use and destruction of stores in certain cases for the general benefit and which are permitted to be claimed in General Average. And if it be argued that it is the proper use of powder and shot to be expended in firing at an attacking enemy, it may be replied that it is only the foreseeing care of the owners that provided these serviceable ammunitions. Had the ship not carried them the owner would have saved their cost, and all parties would have lost their property; but by his providence and the expenditure of his stores the loss to all the co-adventurers has been prevented.

The French *Code* names as an article of General Average “the healing and keep of seamen wounded in defending the ship;” and it adds to this, “the wages and victualling seamen during detention when a ship has been arrested in its voyage by orders of some power.” *Tit: xi., Art: 400.*

OF THE RULE RELATING TO THE CAUSE OF LOSSES AND EXPENSES.

The conclusion of this part of the subject is the most fitting place to return to the subject of a maxim which was merely touched on before, viz. that the proximate (we may read *immediate*) cause of loss, &c., is to be looked to, and not the remote one, in placing the onus. *Causa proxima non remota spectatur.* It is admitted by the supporters of this dictum that the exceptions to it

are numerous; and as it contains a partial truth no objection could have been taken to the sentence expressed in a modified form, as "in many cases," or even, "in general, we are to look to the immediate and not to the remote cause." Unquestionably in numerous instances the opposite proposition may be maintained with equal success—namely, that the original or ultimate cause of loss is to be sought and is to decide where the onus should fall. The majority of cases where a rule can be applied will be found to bear this out. Thus in the instance of Barratry; the first cause of loss and that which decides the result is the master's or mariner's barratrous conduct, although fire, or water, or rocks, or custom-house authorities may be the immediate cause of the property being lost to its owners. So with unseaworthiness. If an owner knowingly send his ship to sea in an unseaworthy condition and she be lost, though sea perils are the immediate cause of that loss, the guiding one is the unseaworthiness of the vessel. Lord Campbell alluded to this very circumstance in giving judgment in *Thompson v. Hopper*,* and said, "The wrongful act of the plaintiff led to the loss, though it was not the proximate cause."† So again when masts, rigging, sails, &c., which have been carried away are encumbering the decks or hanging in the water, and are then cut and cleared away, the proximate or immediate cause of their loss is the knife and the voluntary act which disengaged them, and this if looked to would class them in the category of

* Nov. 1856, E. & B. 937.

† The judgment in this case was afterwards reversed. (Exchequer Chamber, July, 1858.) Six judges upheld the doctrine of the proximate cause prevailing, and one judge dissented thereto; 6 E. & B 172, 186, 192, 205; and see *ante*, on this subject, at p. 43.

General Average; but custom practically decides otherwise, and refers their loss to the original cause, viz. the force of the elements. I believe it will be found throughout, that we shall have to be led by the reasonable principle, that in deciding on the destination of average losses and expenses we must be guided by the true and effective cause in which the loss or the expenses originated.

There will be exceptions to this rule, as to every other which applies to average. The voluntary running a ship on shore is the original cause of the damage which ensues to ship and cargo; but, for reasons which have been already stated, the originating cause in this case is conventionally disregarded in England, though not in other countries. Other instances will suggest themselves to the reader in which custom or expediency is to be followed.

OF CERTAIN EXPENSES ENTITLED SPECIAL CHARGES.

Besides the charges which benefit all the interests at once and thus apply generally, there are others which belong in particular to one or the other of the interests. The taking out of the Cargo when it is necessary for the repair of a ship is, we have seen, a subject of General Average; and so is its carriage and delivery into a warehouse or place of safety: but the goods being safely stored remain at their own responsibility; and the rent of the warehouse, its insurance against fire, and any means taken to prevent the merchandise from being injured or to improve its condition when damp or damaged are expenses chargeable specifically to the cargo itself. The expenses of survey on goods, carriage to a kiln to dry and back to the warehouse, are of the same character. So

are new cases and bags, and the coopcrage and other repairs of packages.

Then, to the Freight are charged the expense of conveying back the goods from the warehouse to the shipping place, the wharfage and quay dues, the lighterage on board, the labour reloading, stevedores restoring, metage at reshipment, use of screws for bottom cargoes, pilotage out of harbour, boats and men assisting, steamers towing out, &c.

The modifications of the foregoing general statement will be found in *Attwood v. Sellar*,* and the unfinished case of *Svendsen v. Wallace Brothers*.

Lastly, to the ship are placed surveys and several charges which we shall speak of in detail when we come to the subject of Particular Average on ships.

WHETHER THE FOREGOING SPECIAL CHARGES ARE RIGHTLY CLASSIFIED IN BEING EXCLUDED FROM GENERAL AVERAGE.

It has, till lately, been usual to distribute the several charges just spoken of in the manner described. This was done upon the hypothesis that the consequences of an act of General Average, viz., the landing the goods, cease as soon as those goods are placed in safety on shore; and after that, the several interests for a time are isolated from each other. But a serious doubt has long been entertained whether this view is correct; whether it be right to divide the act of General Average; whether, in fact, a General Average arising from the necessitated landing of cargo is complete till the goods are back again in the ship, and the ship again on her

* 4 Q. B. D. 342; 5 Q. B. D. 286.

voyage. On this supposition the General Average is only inchoate when the goods are landed. For it was not the intention in discharging the cargo simply to place it in safety ; it was done for an ulterior object, that of placing the ship in such a condition that she should be able to convey those goods on to their destination. Thus the safety of the ship was regarded, the conveyance of the cargo to its market, and the making secure the freight, which could not be secured except by delivering the goods as stipulated in the bills of lading. Why then should the custody of the goods whilst detained on shore be charged separately to them ; or why should the freight bear the whole burthen of putting back the goods into the ship, when both these expenses are parts only of one design, whose object is the general benefit of associated interests ? Why make a distinction which often presses heavily on one of the interests, and would naturally distribute itself more equally among them were the charge classed with the General Average ? The answer to these inquiries will be, as before, that the *mediate* and ultimate consequences of an act are not necessarily in the same category with the act and its *immediate* consequences. But to show that this argument is only used when convenient, we may compare it with the reasoning on an exactly parallel case, which is this :—If a cargo of corn, or some other destructible article, heat from natural causes, and necessitate the ship putting into a port and the discharge of the cargo, the expenses incurred will be applied, properly, to the cargo exclusively (because arising from its natural constitution), and not be charged to General Average.* The

* Practically, the discharge of a grain cargo is nearly always made

storage goes, of course, to the cargo ; and the reshipping expenses go—not to freight now, *but to the cargo alone*, since the landing was rendered necessary by the natural heating of the cargo. Observe, in this view the storage and other charges result from the cargo's heating, and, *therefore*, the reshipping charges and outport charges are all to be charged to cargo, as that was the prime cause of their being incurred. It is no longer said that the cargo being once on shore and in safety it must be put back at the freight's charge, so that the freight may be earned—but that the expenses must be taken as a whole, because the whole grew out of the natural processes of the cargo. Then why not apply such a rule to the reshipping charges, &c., on goods landed from causes which are the ground of General Average? Let all that relates, as it were inherently, to the separate interests,—such as repairs to ship, deterioration of cargo, and diminution of freight—be borne specially by the separate interests; but consider the expenses which are undertaken to set the ship forward on her voyage to be General Average.

We are coming to a more reasonable view of the matter; else it might be asked specially, why is the single interest of freight selected to bear all the expenses of reshipment and exit from port? The usual answer is, because unless the goods are placed on board again, the freight cannot be earned. The reply is true as far as it goes. Unless the goods be put on board again, and the vessel be sped anew on her voyage, the cargo cannot

General Average, if the least colour can be found for considering the *original* cause for landing it a sea-peril. This course appears to be followed in order to waive the difficulties which are likely to arise by charging all the expenses to cargo.

reach its destination. If the ship do not go to sea again she can never return to her owner's port. It is not, then, the freight only which is concerned in the resumption of the interrupted voyage; cargo and ship are equally interested; and as their value is generally greater than that of the freight, they have, in reference to value, a stronger interest even than that of freight. Nevertheless, by the practice in England, the expenses here spoken of have hitherto been placed to the charge of freight exclusively.

The old Spanish commercial law on this subject, though opposed to our own practice, appears at least logical. It proceeds on the principle that the *first* or *real cause* of expenses is responsible for *all* the consequences. If, according to this code, a ship puts into an intermediate port owing to a leak proceeding from inherent defect, the owner is chargeable with every expense until she have resumed her voyage. If she goes there from a necessity which we call Particular Average, the underwriters on ship pay the whole expenses. If the forced deviation arise from the state of the cargo, on the cargo all the charges are thrown. Finally, if the cause of putting into port be one in itself of General Average, as, for instance, if the crew had been obliged to cut away the masts, then all the disbursements and the repairs are claimable as General Average.

It is not here suggested that it would be advisable to follow out the Spanish rule in its integrity, although there is a great degree of consistency about it.* Legal

* The meaning of the Code, however, is not very clear or consistent. It is difficult to reconcile with it the newer Spanish Code, that of 1865, which, read by itself, seems to assimilate very much

decisions bearing directly on General Average were not very frequent in this country till within the last few years; but in connection with this part of the subject may be cited three judgments, which, if not, at first sight, very consistent with each other, are much to the point; and the first, that of *Moran v. Jones*,* goes far to uphold the doctrine of the oneness or inseparability of an act of General Average. This decision would have been of greater value but for a circumstance which has to be mentioned and remarked on after giving the substance of the case.

The *Tribune*, bound from Liverpool to Callao and the Chincha Islands, under charter, in ballast but with a few goods on board, struck on the East Hoyle Bank. One of her masts was cut away, but she became fast on the ground, and she was scuttled. Some of the ship's materials and the small quantity of goods on board were sent in lighters to Liverpool, and were stored in safety. Part of the ballast was thrown overboard; after which the ship floated, and was towed back to Liverpool. The point really at issue was whether the expenses incurred in getting the vessel off and up to Liverpool were General Average, so as to affect the freight and make it liable to contribute towards them; and further, incidentally, whether the cargo was likewise liable to contribute, because that liability affected the freight, inasmuch as if the cargo were a contributory it would reduce

with our own custom. The law of Portugal appears founded on the same model, and contains the same inconsistencies between paragraphs, unless a new or altered Code has been produced during the last half century.

* 7 E. & B. 523, Q. B. 1857.

the proportion of average payable on the freight. Lord Campbell stated, as might be supposed, that the Court entertained no doubt as to the contribution of the freight, because all the costs of getting the ship off and up to Liverpool were necessary to allow her to go to sea again ; and unless she could go to sea the freight was imperilled, and would have been a loss on the policy. But what is more important, his lordship proceeded to decide as to the cargo ; since, although the liability of freight was the question before the Court, the liability of the cargo was involved as affecting the amount payable by the freight. And he proceeded to say, “ It seems to us that the act of putting the goods on the lighter was only part of one continuous operation, viz., getting the ship off the bank on which she was stranded, and sending her to Liverpool, where she might be repaired, with the view to prosecute the original adventure. When she got to Liverpool the operation of saving her from shipwreck was completed, and the whole expenses of the repairs fell upon the owner, &c. ; but the expenses of this continuous operation, for the common benefit of ship, goods, and freight, are the subject of a General Average.” Again, “ The goods were put into a lighter by the master of the ship, along with materials of the ship saved from the wreck, and they remained in the custody and under the control of the master till the ship was repaired, when they were reloaded in the ship and carried forward, without any interference by the owner of the goods, to their destined port. Unless it had been intended that an operation should have been undertaken and completed, by which both ship and goods should be rescued from the peril to which they were exposed,

nothing might have been done, and the goods might have perished. Because the goods happened to be saved in the earliest part of the operation, this can be no sufficient reason for saying that they ought not to contribute to all the expenses of the operation, which contemplated the benefit of all the interests imperilled by the stranding."

So far the judgment of the Court is lucid and satisfactory; and if it stood alone, it would be a valuable guide, not only in the settlement of all similar cases, but also of analogous questions of Average. It happens, however, that the same learned judge had delivered himself, ten months before this judgment, in another case of singular similarity to that of the *Tribune*, in which he had come to deductions singularly different.*

The trial of *Job v. Langton*,† related to the *Snowdon*. She sailed from Liverpool for Newfoundland with a cargo, and got ashore in Malahide Bay. The goods were landed, and were forwarded to their destination by another vessel. When the cargo had been discharged, the ship was towed off by a steamer, a channel having been cut to facilitate her extrication, and she was taken to Liverpool to be repaired. The two cases seem, therefore, to proceed *pari passu*; with the exception that the *Tribune* reloaded her cargo and completed her intended voyage, whilst the cargo of the *Snowdon* eventually went forward by another vessel. This difference might have been supposed to constitute a valid distinction in the two

* Upheld in *Walthew v. Mavrojani* (the *Southern Belle*.) Cargo discharged at Calcutta. Expenses of getting ship off subsequently, not General Average.

† Q. B. June, 1856, 6 E. & B. 779.

cases, if one existed at all: but Lord Campbell waived it, saying, "We do not attach any importance to the fact that the cargo was forwarded by another vessel; and we should give our decision as if the *Snowdon*, after she had been repaired, had carried the cargo to its ultimate destination." He may, in consequence, be said to have made the facts of the two ships identical. His decision was, that the expenses of getting the vessel off and of taking her to Liverpool, *are not chargeable in General Average*. He supported this view by a long chain of argument, too extensive to introduce in the text of a manual like this.

It must certainly be considered very unfortunate that two decisions by a judge of such high authority should seem to contradict each other, and leave a question in a state of greater uncertainty than before it was touched by him; but it may serve to show that where arguments of great force or of great delicacy can be urged on both sides, conclusions in such matters are not so irrefragable as to convince all persons; and that two minds may be led to opposite results in a manner equally satisfying to themselves, and that this may also happen to the same mind at different times.

After these cases were decided, the cause of *Walthew v. Mavrojani* * was tried: the ship was one of those which were exposed to the great cyclone at Calcutta. She was driven on shore; the cargo was discharged and landed, and was stored in a warehouse in safety. Afterwards measures were taken at a great expense to get the ship afloat, and were successful. The cargo did not go forward in the original vessel, but was transhipped to

* Ex. Ch. Feb. 1870, L. R. 116.

its destination. It was urged that in undertaking the large expenses attending the getting the vessel afloat, regard was had to the re-uniting of the interests by the reshipping of the cargo and the continuance of the voyage :—that indeed it would have been rash to undertake such charges for the sake of the ship alone, which was in a damaged and dangerous state. The Court, however, held that the expenses of getting the vessel off could not fall under the head of General Average.

The reconciliation of these cases does not now present the same difficulties as when the decisions were delivered. Clearer views of the principles of General Average prevail. An intelligent perception of the subject has spread abroad ; and as the whole commercial community is to a greater or less extent practically interested in matters of Average, so it has been found necessary by very many of those concerned to study the laws and customs which govern it.

A guiding principle will be found expressed in saying that the values or interests imperilled must contribute to the means by which they were rescued ; and that when the association of interests is *finally* dissolved solidarity ceases, and any further charges and expenses become special and individual. Simple as this announcement is, if held fast to, it will solve many difficulties.

OF RAISING FUNDS FOR DISBURSEMENTS IN
FOREIGN PORTS.

When an English ship under average is in an English port, the expenses are usually paid by the agent drawing a bill on the owner who, by custom, is taken to be purse-bearer for all parties by whom the Average will eventually be paid. Should the sum required be too large for the owner to meet, he sometimes procures a portion from the proprietor of the cargo, and, if he be insured, an advance from his underwriters. Arrangements relating to funds are naturally more easy to make when owners reside in the same country in which the Average occurs, and where there are the means of communication between the master and his owner. Even in foreign countries, it frequently happens that a ship-owner has sufficient credit for the agent or merchant disbursing Average expenses on his vessel to be satisfied with a bill of exchange upon him without further security. It need not be pointed out how advantageous it is thus to be able to raise funds, free from those expenses which an Average often entails in procuring the means of defraying the disbursements. It is one of the many benefits which a merchant gains by shipping goods on vessels belonging to respectable owners, with sufficient capital for carrying on their business. But more often—it may be said in the majority of cases—the agent who advances the money for a vessel under average in a foreign country requires a greater security for his outlay of funds than a simple bill of exchange.

When an owner by his credit or possession of means

can relieve the associated interests from bottomry premium and adhering expenses, it is quite equitable that he should receive a *solatium* for so doing in the way of a commission, for advancing money and costs of transmission. This is rarely objected to when a vessel is disbursed in a foreign country ; for the parties interested have received their *quid pro quo* ; and unless they had themselves procured and sent out funds, would have been subjected to an expense, probably, four times as great as the owner's commission.

When a ship under Average is disbursed in this country, the present practice is to disallow commission on advances by an owner if those expenses are paid in the owner's port ; but to charge a commission if the disbursements are made at another port and at a distance. The exemption ought not to apply to cargo if it has been shipped from a distance, or is bound to a distant port, especially if an option has been given to its proprietors to provide funds.

Insurance of Disbursements.

Sometimes the danger the agent fears is not the insufficiency of the owner, but the subsequent loss of the vessel after leaving the port where the disbursements have been made ; and he contents himself with insuring the sum advanced against this risk ; in which case the premium and expenses of insurance are chargeable in the average statement on the disbursements *pro ratâ*. This course is also taken not unfrequently by the owners or the insurers of ship or cargo ; as in case of the vessel's subsequent loss, they would have to bear both that loss and the previous Average.

Bottomry and Respondentia Bonds.

A very usual manner of paying disbursements is by a Bottomry or Respondentia bond. A Bottomry bond is a bond given by the captain which pledges the ship itself for payment of the advances ; * and Bottomry Premium given on such a bond varies from five per cent. to fifty per cent., or even more. In its proper form it takes effect only at the termination of the voyage and at the place specified in the document; and, usually, three or more days' grace is granted for the captain and owner for satisfying the holder of the bond, after the ship's arrival at her destination. One of the conditions of such a bond is, that in case the vessel, by losses and accidents of the sea, never reaches the place to which she is bound, the bond is cancelled. This risk is frequently provided against by the lender of the money insuring the bond. There are other bonds which are given as collateral security for bills drawn on the owner ; these are considered a spurious kind. They

* This is the usual way of describing the security ; but strictly speaking it is incorrect. Bonds of Bottomry and of Respondentia are really written securities for loans made on the credit of the master and owner ; not, apparently, on the proprietor of cargo. The captain has absolute authority to pledge his owner's credit in these cases of necessity ; and no doubt the value of goods in a ship in distress and the responsibility of their proprietor weigh much in deciding a lender to advance money on bottomry. Besides, a master has general agency authority, and can even sell part of the cargo if that necessity arise. The bond-holder's remedy is not confined to the things themselves—is not strictly *ad rem*, because he has a remedy even against the owner—though proceedings in practice reduce it to much the same as if it were so. The master or other person having authority to give and sign a bond remains personally liable, the owner also through his agent's act.

generally contain a clause that if the bills are duly honoured and paid, the bond shall be void, and the premium stated therein not be enforced. This non-enforcement of premium is sometimes the case with valid Bottomry bonds, where the person advancing does not seek farther profit than his commission and agency, but requires a security. There are other bonds of an irregular and ambiguous nature; some of which are for time, and follow the vessel about; sometimes precede her, and are made the means of getting bills of exchange paid in advance before the ship arrives. Such bonds are exceptional, and do not fulfil the meaning or intention of Bottomry.

When the freight and the cargo are included in the bond it is called a Respondentia bond, or bond of Bottomry and Respondentia. In this case the holder's lien is first on the ship itself, next on the freight, and lastly on the cargo. The bond gives the holder the right, in case of nonpayment, to sell the ship, confiscate the freight (out of which, however, the seaman's wages must first be paid), and then, and lastly, to sell as much of the cargo as is required to make up the sum of the bond with its premium, unsatisfied by the two former means of payment.*

If more of the cargo is sold than is necessary to pay that part of the bond which applies to the cargo, the remedy of the proprietors of cargo is personally against the shipowner.†

It is needful that a lender should exercise care in making advances on Bottomry. He is not by his facility

* See foot-note, p. 122.

† A Respondentia bond may be given on the cargo itself alone.

to encourage a shipmaster in an extravagant expenditure. He must ascertain by inquiry that the loan demanded is really wanted for the necessities of the ship ; and advertisements for Bottomry must state the object for which the money is required. After this preliminary inquiry, it is not pretended that the lender is bound to see to the application of the money—how it is actually expended.

When two or more bonds are given on the same voyage the last takes precedence, and so on in a retrograde order. The last one being satisfied, the penultimate takes what is left, &c. There is one exception, however. If after a bond has been given the captain obtains a credit from his owner, and then gives a subsequent bond, the first, in this case, takes priority.

It has been thought that it is illegal to lend on bottomry to an English ship in an English port ; but in the case of *Arthur v. Barton*,* it was decided that the master of a coasting vessel could bind his owner residing in England by a bond given in one of our own ports.

If a bond is oppressive from exorbitant interest, &c., or bad in itself, the Court of Admiralty can give protection and relief from it. And where the Admiralty Court is made use of to enforce a bond which is fraudulent, a court of equity has jurisdiction, and will stay proceedings.†

Should a vessel on which a Bottomry bond has been given be subsequently wrecked, or sold on account of further damages received ere she reach her destination, the bondholder must receive the net proceeds of sale in

* 6 M. & W. 138.

† *Glascott v. Lang*, 2 Phill. 310.

satisfaction—or in part satisfaction—of his security. By no voluntary act to compass the non-arrival of the ship at her destination will the bondholder be deprived of his right.

The defeasance of a Bottomry bond is by two events:—First, the payment of the bond; secondly, by the total loss of the property hypothecated. A constructive total loss does not vacate the bond, although the holder or his agent receive the salvage or proceeds of sale, being less than the amount of the obligation. In the last case, it seems, the bond-holder still has his remedy for the unredeemed part of the bond, which “remains in full force and effect.”

There is a third condition of defeasance occasionally inserted in bonds, as follows: “or, in case of the loss of the said ship or vessel, such an average as by custom shall have become due on the salvage,” [shall be paid by the obligors] “then this bond, &c., to be void and of no effect.”

Baron Martin said in the case of *Broomfield v. Southern Insurance Co.*,* “It is certainly difficult to find the meaning of the words used in the bond: their meaning must, indeed, be sought in ancient forms; and the condition appears to have been copied from a form of Bottomry bond in use at Cadiz, and to refer to a system then existing in Spain, of dividing proceeds, in case of a loss with salvage, between two sets of creditors.” Here, again, it will be noted that the word “Average” means a division, or share of a thing divided. But an underwriter on a Bottomry Bond is not affected by a constructive total loss. To constitute a claim against him the loss must be absolute and total. This doctrine is emphatically

* Exch. April, 1870, L. R. Vol. 5, 196.

laid down in the case just quoted of *Broomfield v. Southern Insurance Co.* And it seems that the bond still lives, after the holder is partially satisfied out of salvage, and can still be put in force against the obligors for the unpaid balance.

Bottomry bonds being a feature of so much importance in maritime commerce, it may be well, even at the expense of some repetition, to describe them in more exact terms than have been used in the preceding paragraphs. A Bottomry bond is a written engagement entered into and executed, usually by the master of a ship, in consideration of a sum of money lent for the necessities of the ship; which necessities or purposes may include expenses relating to the cargo also. These bonds are generally given at a place apart from the vessel's hailing port or owner's residence, but not invariably; and formerly it was not uncommon to execute a Bottomry bond at the ship's port of sailing, to secure advances made to the owner for outfit and the expenses of the intended voyage. The instruments now being described have a similarity to deeds of mortgage, but they are marked with important differences. The holder of a Bottomry bond is secured by the personal indebtedness of the borrower, who is nearly always the master, and on the "bottom" of the ship, by which is understood the whole ship and her apparel, &c., without exception. The term "*bottom*" was an old expression for the entire vessel, according to a known form of speech by which the whole of a thing is intended under the name of a fundamental part. Former writers not uncommonly spoke of shipping under the name of "bottom;" nor has the expression been altogether given up in our own days. When a bond includes

as its security the cargo as well as the vessel, it is styled a bond of Bottomry and Respondentia ; but merchandise is often, or rather generally, included in the security of bonds, even when they bear, for shortness sake, the single name of Bottomry. These engagements, which come under the general term of deeds of hypothecation, because based on the pledge of the property named in them, are practically distinguished into two classes—real and colourable. A bond is colourable and invalid when it is given as a collateral security for a loan made to the master or owner, and secured by a bill or undertaking previously arranged ; the bond being added, as it were, by an after-thought, and for additional safety. A bond is invalid also by non-compliance with certain preliminary conditions ; and also when it includes moneys taken up for purposes other than the objects mentioned in the bond. As to invalid or colourable bonds,—those which are given to a lender as an additional or collateral security, and which could not be enforced in the Court of Admiralty, a good deal might be said. The Admiralty Court is the ordinary tribunal before which a Bottomry bond is enforced or resisted. The Court has its rules for interpreting and deciding ; and one of its manners of dealing with a Bottomry bond is the unusual one of supporting one part of it and dismissing another part—on the dictum that a bond may be good in part and bad in part ; so that the invalid portion of it does not necessarily taint the whole security and prove fatal to it, as it would do with most other instruments.

The notes of a valid bond are these : that a ship being in distress, or under necessity of raising funds, the master makes application for a loan, specifically

stating the object to which it is to be applied, and which should be the extraordinary disbursements on account of ship, or ship, cargo, and freight; that applications to several parties are made, or advertisements inserted in the journals of the place, for tenders of terms on which a loan by way of Bottomry will be made; that the money so raised is really applied for the necessities which demanded the loan; that in places where the means exist, the owner or those interested in the cargo be first communicated with, unless the delay by so doing would create loss, or keep the master in great difficulties;* that the bond itself specifies the necessities which created it, and that publicity is given of the captain's needs; that the terms be, that on the ship's arrival at the port or place named in the bond, the bond shall take effect, and payment be made for its discharge within three (or any other specified number of) days; in failure of which the holder of the bond, who may be an endorsee, shall proceed to sell the ship, appropriate the freight, and sell such portion of the cargo, as is required (the whole if needful) to satisfy the bond; that the premium for the loan is mentioned in the bond and added to the sum lent, so as to form part of the amount of the bond; that in

* Though the Court of Admiralty has become more emphatic on the condition precedent in a Bottomry bond, of communication with the parties interested, the necessity does not affect the validity of a bond where the ship is under a foreign flag, which nation does not require that condition. Thus, where the shipper and the consignee of cargo by an Italian vessel, which vessel put into Fayal, a Portuguese port, and then gave a Bottomry bond with the sanction of the Italian Consul there, the bond was held to be valid, though there had been non-communication. Both shipper and consignee are bound by the law of the flag. *The Gaetano and Maria*, Court of Appeal from the Admiralty Div., May, 1882, M. L. C. LXI. O. S. p. 535.

case the ship and her cargo be cast away and lost, the bond is to have no effect whatever, but is null and void. These last terms seem to mean the total loss of the hypothecated interests, because if some wreck and part of the cargo of a vessel stranded or lost were saved, the holder of the Bottomry bond would take possession, but would have to pay salvage expenses on them.

True bonds are often given simply to secure the lender for the advances he has made for ship and cargo. If the lender be also the agent who has disbursed the ship at the port of distress he may be content with the commission and agency he has charged in his account of disbursements, and not desire to make a gain of the premium inserted in the Bottomry bond. In such a case, it is frequent to notify by a letter, or other means, that if the bond be promptly paid to the extent of the sum lent, together with the cost of insurance on the same, and, it may be, interest till the time of payment, the premium will not be demanded. Such an arrangement is quite in order, and does not affect the validity of the bond. It is preferable, in my opinion, to another means of accomplishing the same object: that of giving an option, as it is called, of purchasing the bond, to the owner or his representative, for in the former case the bond is cancelled and given up to the borrower; but in the latter the purchaser may keep the bond alive as any other endorsee would do to whom it has been sent for collection.

Two things are pledged under a Bottomry bond,—the credit of the borrower, and the ship with freight, and, generally, cargo. The master of a ship being usually the person who gives the bond, impliedly involves the

credit of his owner, because he must be taken to be the agent of the latter in all actions not wrong or barratrous ; but he does not pledge the credit of the owners of cargo, but only the value of their goods.

When a vessel under a bond reaches the port where that bond is to take effect, in case of failure of payment within the specified days, the proceedings taken are always *in rem*. But though under an Admiralty warrant the ship be sold and the freight assumed by the bond-holder, and the cargo, if any, also sold, and the whole be insufficient to satisfy the bond, the credit of the borrower is still engaged for the deficiency. Proceedings on a bond, cannot, therefore, be said strictly to be *ad rem*, for the bond-holder has the remedy beyond, as on a covenant debt, for the unsatisfied balance of the bond.

There is a species of bond irregular in form, though, perhaps, not to be called spurious, which runs with the ship on her voyage, not taking effect at the first port of destination if there be more than one, and on which the consideration to the lender is not a fixed premium, but what is termed maritime interest, at a certain rate per annum, payable till the bond is discharged. Such bonds are far less common than the ordinary engagements on Bottomry, and do not possess that definiteness which makes the latter safe and valuable. Nevertheless, under them the ship, freight, and cargo are hypothecated.

A Bottomry bond is spurious or invalid when it is given as a collateral security to a loan made on other conditions, *ex. gra.*, as further security for a bill drawn on the owners. It fails to have force in law, because if both the bill and bond were enforceable, the lender would

have two separate and independent rights of recovery in respect to one debt, both of which might be successively or even concurrently put in action. Though the propriety of this legal principle cannot be denied, it is also plain that some collateral security to a bill drawn for the necessities of a ship and her cargo on persons unknown to and at a distance from the lender, and who may refuse it acceptance or fail to pay it when due, is often highly desirable, and would facilitate such loans and promote the interests of commerce. Indeed, we see that, such a necessity existing, this kind of security is given to loans at intermediate ports; and the requirements of the law to render bonds valid being known, no great ingenuity is required to simulate the features of an actual loan on Bottomry so completely that attempts to upset such bonds would generally prove fruitless. This is done, not for the purpose of evading law, but out of the need of securing a lender for advances which he is willing to make on a bill, if he can do so prudently and without the risk of losing altogether that which he lends.

After all, the bespeaking money on Bottomry in the proper form, and the securing money already advanced by a Bottomry bond are not methods so remote from each other as in themselves to constitute distinct legal principles. The abhorrence of the law to a colourable or collateral bond has been already shown to arise from the anomaly of two debts, with separate powers of recovery, being made to grow out of one advance; and the mercantile danger to be dreaded in giving foreign or distant agents the power to bind ship and cargo on every occasion, is that of encouraging masters of vessels in unnecessary and extravagant expenditure in ports which

they enter on their voyage. When the large powers which are necessarily placed in a shipmaster's hands and the great values committed to his care are considered, the conviction is brought home of the importance there is in drawing a very careful line in the borrowing powers of a shipmaster, so as not, on the one side, to tie his hands in times of difficulty and misfortune ; and on the other not to allow him on every small or pretended occasion to send the ship home fast fettered with obligations on her owners and the proprietors of her cargo.

If after a vessel has left an intermediate port at which the master has given a Bottomry bond, she meets with new misfortunes, puts into a second port, incurs fresh expenses, and the captain has again to take up money on Bottomry, the rights of the lender on the second bond take precedence of the first. No one can doubt the propriety and expediency of this arrangement, in which a Bottomry bond differs so widely from a deed of mortgage. In mortgages the first mortgagee always retains his precedence ; and if other deeds are executed in respect of the same property he still has a priority of right ; but in the case of Bottomry, if a second loan is necessitated on the same voyage, the first lender becomes, as it were, a borrower himself from the second lender, by whose means all the property is rescued from impending loss. He does not, however, contribute to the second premium on the amount of the first loan, but his rights of recovery are postponed to those of the second lender : the rights of a second to those of a third, &c.

On the ship's arrival at the port at which a Bottomry bond is to take effect, the bond is presented by its holder

or his agent or other endorsee. The money has to be provided for its payment within the specified days. Sometimes the owner finds the money. In other cases where the amount is large and there is a cargo, he applies to the proprietors of the latter for assistance, and they often advance what is roughly estimated as their proportion of Average disbursements and premium. If the bond is not paid off in the specified time an Admiralty Warrant is applied for and put on board, and expenses commence at that instant. Should it become necessary to sell the ship to satisfy the bond, the sale is made by an order of the same court, at auction. By a practical tradition, or a custom, which would be more honoured in the breach than in the observance, a vessel sold under these circumstances generally fetches a very low sum, often not more than half its value. It is "sold under a Bottomry bond," and is consequently a doomed thing.

When it becomes necessary to sell cargo in payment of a Bottomry bond, the proprietor of the goods has a remedy at law against the shipowner for the proceeds of the sold cargo, and for the loss occasioned by so selling, so far as they exceed the sum due by the cargo for its contribution to general expenses, its payment of special charges on the cargo itself, and its quota of the Bottomry premium. This was authoritatively decided in *Duncan v. Benson* (in error),* and in a case before the House of Lords arising in respect of the same ship. The Danish and Portuguese law is similar to our own on this head; but in France and Holland a shipowner can free himself of responsibility to the proprietor of the cargo (and I

* 1 Exch. 537 : 3 Exch 644.

may add, to the bond-holder also) by abandoning his vessel, and allowing it to be sold, and giving up the freight. In the countries named, therefore, the right as to the ship is strictly *in rem*, considering freight as an incident of the ship—the thing.

As to the propriety of a Bottomry bond contributing to a General Average subsequently incurred, see *post*.

A Bottomry bond being an insurable interest, other questions arise as to the loss on such a subject of insurance. It is not permitted that by voluntary acts a ship at an intermediate port should be taken as constructively lost, so as to give the bond-holder the right of recourse to his policy for the amount of the bond. In *Broomfield v. Southern Insurance Co.*,* where a ship was sold at a port short of her destination as a constructive total loss, the Judges held, without hesitation, that there was no claim upon the underwriters of the bond.

Sale of Cargo.

Bottomry being at best an expensive means of raising money, a shipmaster is bound to circumscribe the sum borrowed as much as possible. He will therefore apply the sale of any condemned stores of the ship, and the proceeds of any damaged goods, part of the cargo, which surveyors have recommended to be sold on the spot, in diminution of the amount of his disbursements. Sometimes it is impossible to raise money at all on Bottomry; and sometimes the rate demanded is so high as to appear ruinous, and other means for obtaining funds are resorted to. A captain under such circumstances may proceed to

* L. R. 5 Exch. 192.

sell a portion of the cargo ; but he has no right to sell an entire cargo at an intermediate port to raise funds to repair his vessel.* He has the same right to sacrifice a part, that the remainder of the interest may reach their destination, as he has to throw a portion into the sea to procure the safety of the rest. He will in this matter, as in all others, exercise discretion, and he will not dispose of more than is absolutely needful. The loss on such a sale will form an item in the average adjustment, and will be applied to the columns of disbursements *pro rata*. The loss is ascertained by making up a simulated account sales, as if the goods sold had arrived in a sound state, and deducting the actual sales. In settling with the proprietors of cargo for the average, the sound value of their goods sold is set off against the amount claimable from them for General Average and charges.

I have heard no reason assigned for the dictum that an entire cargo may not be sold to bring home the ship. Such a necessity may arise ; and it is only a principle carried to the extreme. The value though not the form of the cargo remains.

BY WHOM, AND AT WHAT TIME, GENERAL AVERAGE
IS TO BE PAID.

It has been already stated that the instant a sacrifice is made or an expense incurred for the general good, it becomes a debt due by all the benefited parties to him by whom the loss is sustained or the disbursement has been

* *Heydorn v. Bibby*, Exch. June, 1855.

made. But a contribution by all parties towards that loss or outlay may not be, and generally is not, convenient or even practicable at the moment, and it must be deferred till some after time. That time is usually the arrival of the ship at her port of destination; and this for several reasons. First, because there the proprietors, or representatives of proprietors, of all the property will be found; there the proper persons are generally to be met with to adjust the claim in a *Statement*, and supply the legal or notarial documents that are required; there, too, a uniform scale of value can be adopted as the basis of contribution; and, lastly, there the means will exist for enforcing payment should any of the contributors resist a claim for their quota.

The persons who should contribute are, primarily, those to whom the property actually belongs: but consignees, factors, and agents may also be asked to contribute for the goods under their charge; and in general they will have the means, out of the goods in their possession, of making repayment to themselves for the sums contributed in respect of those goods. But if the captain or owner or agent of the ship finds there is likely to be any withholding or disputing payment of the General Average, he may refuse to deliver the goods until he is satisfied that the receivers will pay their proportion. And, in order to facilitate matters and avoid delay, especially in cases of perishable cargoes, it is common for the receiver of goods to execute a promissory document called an Average Bond, drawn by a solicitor or notary, engaging to pay his proportion of the General Average, as soon as that has been ascertained by an

Adjuster, on the condition of immediately receiving the goods to his address. Such a bond is by no means necessary. In reality it adds nothing to the obligation the proprietor or his representative is under of making good his share of the Average Contribution, because that share is a debt already due, and recoverable by action at Common Law. Nevertheless, practically, the signing a document seems to a captain or owner an additional guarantee; and it must be owned, that the formal recognition in writing of a prescriptive right frequently prevents dispute or discussion of that right. To those persons who are properly advised on the subject, or who are themselves aware of the law and practice, a saving can be effected of the expense of the bond by substituting a simple letter, signed by the receivers of cargo to the shipmaster or owner, containing the same conditional promise. Other persons, still more informed or still bolder, will proceed to deliver the cargo without any such undertaking at all. There are, however, many cases where a promissory letter is advantageous, is a saving of time and a preventive of disputes.

A custom has grown up, and has in one port, at least, of England become very common, by which the shipowner whose vessel with its cargo has been under General Average, demands on the arrival of the ship, and before he delivers any cargo to the consignees, a deposit, the amount of which he fixes, against the goods deliverable to them under bill-of-lading. This is, in addition to the consignees signing an Average Bond, often of a very stringent and authoritative tenour. There are two or three reasons which make this proceeding objectionable, besides the air of suspicion which it gives to an ordinary

mercantile transaction. First, as at the time of ship's arrival the quota of Average and charges cannot be known to the shipowner, a guess has to be made as to the deposit claimed; and that he may be on the right side, the contribution is often, we may say generally, greater than the actual requirement, and it frequently happens that on the completion of the Average Adjustment part of this deposit has to be returned to the receivers of cargo. Secondly, the same course is often followed when part of the forthcoming claim for General Average consists of the jettison of cargo; and it not uncommonly occurs, that instead of the ship being a creditor to cargo-owners, the balance is the other way, and the merchant should have demanded a deposit from the shipowner for the value of deficient goods. Then there is the danger of the ship-owner's failure, after he has called in the deposits and has not paid out claims for goods jettisoned or sold. To meet this eventuality, a plan has been grafted on to the bond-and-deposit system by which the deposits are paid to the joint account of two trustees, who have also to pay out the final balances. There may be occasions when these precautions about Average Contribution are necessary, but the more sparingly they are resorted to the better. When the deposits are larger than the final sums required, interest is certainly due to the depositors.

If the occurrence which gives rise to a General Average happen in an early part of the voyage and occasion the return of the ship to her port of sailing, or some other port accessible to the owner and the shippers of the cargo, it is often convenient that the General Average Contribution should be made there, and not delayed till

the vessel's arrival at her destined port. In this instance a different value must be set on the contributing interests. It will be the cost of all of them at the time of sailing, less any diminution of value by the accident or sea damages. And although this is not strictly the correct method of valuation there is little to object to it, since all the interests are subjected to the same treatment. As to the freight, an exception is made in its favour, and an estimate is formed of what it would produce net when the voyage shall have been completed. It is to be remarked that this and almost every other procedure about freight is exceptional and erroneous. In my "Manual of Insurance" I have entered at some length on the subject of freight, and shall have to speak of it again hereafter and point out some of its anomalies.

When an Average is adjusted and paid at a place short of destination, it is highly desirable that the disbursements should be insured.

Who is to Collect the Average.

There must be a collector or receiver of the General Average. Usually, some one person has made all the disbursements, and to him they must be refunded. Even in the case of jettison, where the goods of various proprietors may have been sacrificed, and as such become a part of the amount to be made good, there must be some one to stand in a central situation as representing the losers of those goods which were thrown overboard, to receive back those blended losses by the general contribution, and afterwards to account separately to the several parties whose goods have been sacrificed. In the

majority of cases this receiver is the shipowner or his agent, or the captain. It is in general held that the owner should provide funds, not only for the ordinary expenses of the voyage but, in the first instance and till reimbursed, for any extraordinary disbursements which may be rendered necessary during that voyage. This responsibility is a heavy one, for Average disbursements are often required of larger amount than the owner has means or power to raise: but the effect of it is, that the shipowner, master, or ship's agent is usually the receiver of General Average. Sometimes, however, as in the instance just referred to, another person undertakes the disbursements; frequently the proprietor or agent of the cargo. And sometimes the outlay is made by more than one, and the subsequent arrangement of accounts becomes proportionally more intricate. In other instances, agents at outports of England where vessels have put in under Average, collect the contributions themselves as being a safer method of securing their advances than by taking the captain's bill on his owners, &c. And occasionally agents go a step farther, and arrange the Average Statement themselves,—a proceeding which frequently leads to difficulties; for as it often happens that they commit some mistake either in the distribution of the expenses, or the contribution towards them, and some party interested is afterwards obliged to rectify the statement, the agent having received the sums and completed the accounts, has locked the door to any correction; since if one contributor discovers he has been made to pay too much, it implies that the excess must be recoverable from the others; but the transaction with the agent has been already closed, and he has received his discharge.

For reasons assigned, the shipowner may be disinclined to, or may refuse the office of, having a General Average stated, and to undertake its collection ; but it seems from *Crooks v. Allan and another*,* and from *Schmidt v. Royal Mail Steamship Co.*,† that a shipowner is obliged, when so required, to have a General Average adjusted, that others who have been losers by the Act of Average, and their underwriters, may recover by contribution.

Average settled in a Foreign Port.

If the ship's destination be a foreign port, the settlement of the Average usually falls under the jurisdiction of the national, legal, or commercial tribunals, and must be paid according to their decision. In general, foreign codes are more liberal and comprehensive in their views of General Average than our own law and custom, and bring into general contribution expenses which in this country are excluded from it. It is, consequently, more advantageous to the shipowner to have an Average settled in a foreign port.

When proprietors of cargo have been obliged to pay in General Average adjusted in a foreign port, expenses which are not claimable here under that head, the settlement is binding on them, and they cannot recover back from the shipowner, afterwards, the difference between what they have been compelled to pay and what they would have been liable for under an English adjustment. In *Simmonds v. White*,‡ repairs to the ship were included

* Q. B. 20th December, 1879, L. R. 646.

† 45 L. R.

‡ 2 B. & C. 805.

in the General Average, which is contrary to our own law and custom ; nevertheless, the plaintiffs, who had been compelled to contribute in St. Petersburg, could not recover back from the owner. The decision in *Dagleish v. Davidson* * confirms the same rule.

Either by special clause in policies, or by tacit allowance, there is an almost universal consent among insurers to pay General Average by foreign adjustments. For the shipowner a foreign Statement is generally more favourable to his interests than one made in England, and on cargo it has been long conceded that as the consignee must pay on the Adjustment presented to him, in order to get possession of his goods, it is proper, and indeed greatly facilitates business, that underwriters should accept the assured's burthen. No doubt this compliance occasionally leads underwriters into an unfavourable situation ; the question of contributing value is one difficulty, and is the one point on which insurers consider themselves not bound by the foreign Statement. More on this head will be said a few pages farther on. Still more important is the reading of the law when by special clause in a policy the admission of foreign General Average is made. In *Harris v. Scaramanga* † the policy, which was on cargo, contained the customary clause "to pay General Average as per foreign Statement, if so made up." On the voyage from Taganrog towards Bremen, the ship had twice to put into a port of distress, and to give Bottomry bonds for the expenditures. At Bremen, the shipowner being insolvent, or unable to take up the bonds, the consignees had to pay a sum of

* 5 Dowl. & Ryl. 6.

† In Banc. June, 1872, L. R. 7 C. P. 481.

money to cancel the bonds and get possession of the cargo. The Adjuster at Bremen classed this sum in General Average, and the Court held the underwriters liable for the amount, under their stipulation to pay by foreign Statement.

Disbursements secured by a Bottomry Bond.

When Average disbursements have been discharged by a bond of Bottomry or Respondentia, the person who satisfies that bond at the port of destination is entitled to collect the General Average.

OF THE CONTRIBUTING VALUES OF SHIP, CARGO, AND FREIGHT.

Value of the Ship.

The value of the ship for contribution is her value at the time of her arrival at the termination of the voyage: but if she have met with damage and have been repaired before arriving at her port of destination, the value to be taken is her worth previous to such repair. It is very difficult to fix the true value of a ship, because the price of shipping is continually varying in the market according to the supply, rate of freights, and other causes. Also, the value of a ship is not precisely the price for which she would sell if forced to a sale by auction, and, consequently, not always that at which a surveyor would estimate her,—for he must necessarily have that test of value in his eye. A ship in her owner's hands who has a regular trade or a freight ready for her, has a real value greater than the sum which a buyer without these advantages would be

ready to offer ; * and we have no right to assume that a sale by auction demonstrates her true absolute value, which consists of the price of the thing itself connected with certain advantageous and adventitious circumstances.

But where parts of the ship have been sacrificed for the general benefit, and the cost of them is made good in the Average Contribution, the amount of such *bonification* is to be added to the value of the ship, upon the same ground that the value of goods jettisoned must be made to contribute to the jettison itself.

The value of the cargo is what it has produced, or would produce, at, as nearly as possible, the time of its arrival. If it be actually sold there can be no truer value given for contribution than the net proceeds of the sale ;—that is, the gross amount stripped of freight, duty, landing and all other charges, and brokerage. The only charge which should not be deducted either from a contributing value or from a value of goods jettisoned, is the merchant's own commission ; because that, which is his expected profit, was jeopardised when the goods themselves were in danger ; consequently he was benefited *quoad* the commission by the means which form the General Average.

If the goods be not sold, an estimate must be formed

* A ship, in the eye of the law, is not like a mere commodity, such as sugar or cotton, the true value of which is simply that for which it will sell ; but it is a chattel to which are attached uses and capabilities of profit which go along with it and are inseparable from it. It has, therefore, like several other things, an intrinsic and an adventitious value, both which are very difficult to determine with nicety. In order not to overstate my meaning, it is necessary to add that, by law only incidents pass with a ship, for no contract runs with a chattel.

of their value, and they must be treated in the same manner as if they had been really sold. This is called a *pro formâ*, or simulated, account sale.

In every case it is strongly to be borne in mind that it is *real* and not *fictitious* values which are to be adopted, and that the value given in for contributions is not to be affected by any value assumed in a policy of insurance. Some persons from ignorance, and some designedly, give a value for contribution which is just within the policy value, so that all the General Average they are themselves called upon to pay may be recovered from their underwriters. It need hardly be pointed out that when this is the intention of the assured in giving in a smaller than its real value, the act is simply dishonest; it is forcing on the other contributors a proportion larger than what is due by them.

The value of goods jettisoned is to be added to the value of what arrives: but to prevent mistake in the Adjustment, it is better to show by figures that this addition has been made.

When freight is paid in advance, as is frequently done in shipments to our colonies and elsewhere, it is to be added to the invoice, in cases where the shipping values are resorted to; or, which is more convenient, as the advanced freight has to contribute to reshipping charges, it is given in separately. When freight is prepaid the special charges for reshipment of cargo which has been landed, usually called charges on freight, will be paid not by the shipowner but by the shippers of the goods: for, by prepayment of freight, the owner has no longer any risk in that respect, nor does it signify to him whether the voyage be completed or not. On the

other hand, it is necessary to the shippers that the vessel should proceed on her voyage, and they will have to pay the expense of effecting this object. This must now be considered the settled practice, although in principle it seems objectionable, inasmuch as by it the shipowner is relieved of a duty he undertook,—that of conveying the goods entrusted to him to their destination: and he ought not to be relieved from this obligation because he happens to have been paid beforehand, but on the contrary, ought to do everything in his power to deliver the goods at their destination as contracted by the bill of lading. Where part of the freight is paid in advance and part depends on the completion of the voyage, a partition of the charges must be made; for both owner and shippers have an interest in again sending the vessel to sea.*

The value of the freight for contribution is the amount the ship earns, stripped of the brokerage or commission on the charter; and that part of the crew's wages together with harbour and other incidental charges which become due *after* an act of General Average. The meaning of this arrangement is simple enough: all the charges which were contingent on the saving of the whole interests by the General Average Act are alone to be deducted. That Act could not affect expenses already incurred; and, on the other hand, had the ship and cargo not been saved, no subsequent expenses would have arisen. Thus the ascertainment of the real contingent charges on freight is a much fairer and more scientific

* The special liability of freight for exit charges is partly taken away by *Attwood v. Sellar*; and may be finally done away when *Svensen v. Wallace* is decided.

proceeding than the method used in most foreign countries of dividing the freight equally and taking one moiety to contribute to Average. The victualling of the crew is, however, not to be deducted. This looks at first sight an anomaly, and often calls forth remark : but the reason for the exception is, that the crew's provisions are ship's stores, and are included in the value of the ship. Though this may not appear a very consistent arrangement, it is the existing one.

If a ship be chartered out and home, in one charter, and she meet with a General Average on the outward voyage, the whole freight for the round must contribute. If the Average happen on the homeward voyage, then only the freight at risk at the time is to pay its contribution.

Underwriters on freight gain an advantage by the manner in which it is made to contribute; the contribution to Average being on the amount reduced as above stated, and the premium received being on the *gross* amount of freight.

When a vessel has been re-chartered at an improved freight, the re-charterer is to contribute on his surplus or profit freight.

When an owner employs his vessel on his own account, there is no true freight on which to contribute to General Average : but the increased value of coals or other commodities in which he deals stands in lieu of freight. For some purposes it is necessary to show the *quasi* freight. The current rates are then referred to.

When original values, those at the sailing port, are taken for contribution, the wages and expenses for the intended voyage must be estimated.

Passengers' personal effects and money do not contribute to General Average.

Government stores contribute, like other goods; but in general on cost price, as they are not shipped for profit.

If it become necessary to break up and abandon a voyage begun, the freight is thereby lost, and has not to contribute; but there are cases in which an owner for his own convenience or profit determines to abandon the voyage, though not actually obliged to do so. If this be his choice the freight must still contribute to General Average; since it is not at his option to withdraw a portion of the contributory value to the prejudice of the other contributors.

If when a voyage is abandoned the master or owner determines to forward the goods by other means to their destination, and thereby to secure his original freight, whatever he saves of that original freight, must contribute to General Average.

When chartered freight is called on to contribute it is sometimes difficult to decide when the chartered voyage begins, *i.e.*, at what point the ship is in the hands of, and doing work for, the charterers. The common form of the charter-party does not altogether settle this. Suppose merchants at B require a vessel there to take a cargo to C—the ship being at the time at A. The ordinary charter-party opens with the name, tonnage, and other particulars of the ship, and describes that the *Jane*, being now at A, shall proceed with all convenient speed to B, and *there* load a cargo, &c. The disputed point is, whether the charter has commenced at A, so as to bring in the chartered freight as a contributory, when

a General Average has occurred on the passage from A to B; or whether the words in the contract referring to the passage from A are merely descriptive, and the passage to B is *ultra* the charter-contract, and is only undertaken to make a charter at and from B possible.

Underwriters on the ship are naturally anxious to claim that the chartered freight became at risk the moment the vessel departed from A, and is liable to divide General Average with them. In delivering judgment in *Barker v. McAndrew*,* Justice Willes observed that there was but one case in point—that of *Bruce v. Nicolopulo*,† where it was held that the preliminary voyage to the port of loading was to be considered a part of the voyage within the contract; and in accordance with this authority the Court held in *Bruce v. Nicolopulo*,‡ that the transit from A to B was part of the chartered voyage from B, &c. The question has, however, been set at rest by the cases of *Barber v. Fleming*,§ and by *Rankin, in error v. Potter, in error*.|| When under a charter a vessel sails from the port where she is and proceeds to the port where she is to take in cargo, or her charter is in any other way to become effective, the contracted freight becomes both insurable, and a contributory to General Average. This principle was admitted with comment in the latter case, although the freight, which was the subject-matter, was postponed till after two preceding voyages had been made; or rather, was

* 34 L. J. C. P. 191.

† 11 Exch. 129.

‡ See *Barker v. Fleming*, Q. B. 15 Nov. 1869, conclusive.

§ L. R. 5 Q. B. 59.

|| H. of L. L. R. 6 H. L. 83.

the third link in a chain of a round voyage. This would formerly have been spoken of as only the expectation of a freight.

It is to be remarked that both these decisions were in relief of the shipowner; and their subject was not contribution to General Average. They are valuable as being all the light we have.

It had been hitherto held that human lives do not contribute to General Average expenses, as being immaterial as well as invaluable interests. The case of the *Fusilier*,* however, throws some doubt on this point, where it was held by the Judicial Committee of the Privy Council, Lord Chelmsford delivering judgment, and affirming that of the (Admiralty) Court below,—that when salvage services are enhanced on account of the saving of passengers' lives, or a sum is given for salvage of life, the cargo is to contribute as well as the ship: and the Court cited Sections 458, 459, and 468 of the Merchant Shipping Act of 1854 (P. C., March, 1865).

We are left in doubt by this decision, whether the owners of ship and cargo who have thus contributed by virtue of a decree in Admiralty can afterwards recover from the passengers whose lives were saved that portion of salvage which relates to the preservation of their lives. We have, however, heard of no such claims being preferred; and the salvage of lives seems placed on the grounds of humanity and policy. The safety of the lives on board is often very essential to the saving of the material interests. The first boat which goes off to a

* Br. & L. 341, and L. J. P. M. & A. 25.

ship in danger is the one which would generally bring away the crew. The following boats are occupied with the saving of vessel and cargo. Were it established that the services of the first boat were to be unpaid, where should we find boatmen (beach-men and salvors) risking their own lives in order to save the lives of others? The *Fusilier** allows the first boat to participate with the others in the salvage. There is a rule, notwithstanding, in the Admiralty Court—a strange one, it will be thought—that salvage for life from a sinking ship cannot be claimed unless there be a saving of some cargo also. It is said that a very small quantity saved will satisfy this condition. The reason for this procedure must be found in the fact that all the proceedings in the Admiralty Court are *in rem*; and *animæ* are not *res*.

It may also be a curious question whether the exclusion of human life from contribution towards those means or expenses by which ship, cargo, and lives have been preserved, arises from a consideration of the paramount importance of human existence, and its value incomparable with material things; or whether, on the contrary, it is from a low estimate of life; so that in taking account of the values saved, the ship and the goods of her lading are the only objects of worth, and the lives are thrown into the bargain. It is certain that in the modern practice of the Admiralty Court, the risk of lives in the vessel saved and the risk of life of the salvors is taken into account: and when death is occasioned by collision a scale of value is arranged for the ship's company.

* Br. & L. 341.

BOTTOMRY BONDS.

By English custom, loans on Bottomry do not contribute to General Average. Among the imponderable interests,—freight, some advances, commissions, profits,—which do contribute, it is difficult to see such a distinction as should excuse bottomry from sharing in the common cost of salvation. When we speak of Bottomry bonds being excepted, it is not the bond itself which is meant, but the bottomry loan, which is in peril, and of which the bond is only the evidence or symbol. Indeed the lender on Bottomry is singularly in danger, for his loan is secured on the “bottom,” runs with the ship, and is lost to him if the ship do not arrive at her place of destination. So exposed is he to the danger of non-arrival, that if the vessel (and her cargo, for he generally lends on both), put into a second port under Average, and a new Bottomry loan becomes necessary, the second bond takes precedence of the first, and must be first satisfied—so different in this respect from a first and second mortgage—*because* the expenditures represented by the second bond were essential to the rescuing the first, *quo ad* what surplus of interest remains after the second lender has been satisfied. Why, then, should not Bottomry be equally concerned in all the means by which it may be saved. In some older Bottomry bonds there was even found this provision, “In case of the loss of the said ship or vessel, such an Average” (shall be paid by the obligors) “as by custom shall have become due on the salvage.” Perhaps this may not show an engagement that the bond-holder will pay General Average; and we must still ask why

Bottomry is excused. As Bottomry does contribute, in some countries, to Average, we can only reply that its exemption is founded not on reasoning but on expediency : that it is advisable that obstacles should not be thrown in the way of such loans being raised ; for by their means, sometimes the only available means, the property at risk is extricated from greater sacrifice or total loss. In a case which came before the writer, where by a French adjustment a Bottomry bond was made to contribute to General Average, the underwriters in England of the bond made good the amount the holder of the bond had been obliged to contribute.

In *Greer v. Poole** where in a French port, cargo had to be sold to supply the deficit of a Bottomry bond, the proceeds and loss on the same by sale were held by the Court not to be recoverable on an English policy of insurance, which contracted to pay General Average by foreign adjustment ; the sale not being in itself General Average. This does not, however, touch the point as to whether Bottomry bonds should not contribute.

See *ante*, *apud* Bottomry bonds : and *Broomfield v. Southern Insurance Co.*†

CONTRIBUTION OF ADVANCES.

It was formerly maintained by many persons that the advances made to the master in the port of shipment by the merchant, or shipper of cargo, could not be called upon to contribute to General Average. It was at all times easy by argument to show the error of this view ;

* Q. B. D. M. L. C. 300.

† Exch. 1870, L. R. 5 Ex. 192.

but the case of *Hall v. Janson*,* settled the question definitely, for it was decided in that cause that a custom alleged to exist in London that assurers of money advanced on freight were not liable to make good a General Average loss was no answer to the action. What the nature of an advance to the shipmaster before sailing is, depends on the manner and purpose of its being made. If it be a simple advance for expenses payable by a bill drawn on the owner this is not an insurable interest in the eye of the law, because it is a personal debt of the owner, not dependent on the ship's safe arrival: and since not insurable it is not called upon to pay General Average. If, on the other hand, money is advanced as part of the freight, or repayment is to be made out of the freight receivable at the end of the voyage, it is an insurable interest, and as such must contribute towards General Average expenses: for in the event of the ship being lost, the freight paid in advance would be lost too, as it would not be returned by the shipowner. Such an advance may be put in the light of the person so advancing having purchased a share of the freight; and, therefore, the shipowner has no right to insure the portion advanced, for the same interest in all its rights cannot be insured twice. The subject of insurance, which will be touched on hereafter, is anticipated a little at this point, because it is so intimately connected with the matter of the contribution of advances to Average and the current views entertained about it. Indeed, there was a common opinion at Lloyds' on the subject which seems to be just contrary to the truth:

* 4 E. & B. 500.

for it used to be confidently stated by many that advances, *eo nomine*, were an insurable interest, but that money advanced on account of freight, or repayable out of freight, was not insurable by the advancing merchant or agent. It may be said that at the present day a sounder and more correct view is entertained by underwriters and others concerned. The truth is discoverable by deciding the question—Whose is really the risk of loss by sea-perils on these advances? On whomsoever that contingency rests the right also remains to provide against it by insurance: in other words, that person has an insurable interest. And it follows that if that interest be such as may be subject to danger of loss, it is responsible for any means taken to avoid such loss, and must contribute to General Average. It was, however, satisfactory to have this conclusion supported by a legal decision, because distinctions exist in respect of contributory interests which mere reasoning does not quite determine, and which produce some exceptional cases; such are passengers' effects,—their jewels and money,—which are not held liable to contribute.

REMARKS ON FREIGHT AS A CONTRIBUTORY.

Before leaving the subject of contribution to General Average some remarks are called for as to the exceptional manner in which freight is allowed to contribute.

Formerly, in England, the wages and charges for the entire voyage were deducted from the freight, to determine its contributing value. In most foreign countries a deduction of one half is still made as an equivalent

for expenses of the voyage. Both methods are distinctly erroneous, the foreign system the more so. The object of bringing a ship and cargo to their port of destination is to obtain payment of the *gross* freight. The expenditure previous to an act of General Average, by which all the interests are saved, is irremediably gone whether the ship be lost, or survive the danger. If that previous expenditure have been heavy, there is the greater necessity that the entire contracted freight should be received. The benefit will therefore take effect on the freight receivable.

Having discussed in my Manual of Marine Insurance the inequality of freight as a contributory, when considering freight as an insurable interest, I will not repeat the argument here; but rather point out the propriety of the present English system of deducting from freight when it is brought in to contribute, the wages and port charges which arise *after* a saving act of General Average, for they would not have been incurred if the ship and cargo had been lost. Looked at in a very strict way, some objections may even be found to this reasoning, founded on the nature of freight, and the duties of shipowner and shipmaster.

If by a smaller reduction than formerly, of wages and charges, freight may seem at times to bear a heavier burden of General Average, the tendency of the latest cases at law is to relieve freight from a much greater onus, namely, the outward charges from a port of distress, which till lately have, in our country, been applied specially to this interest. I need not reiterate the views put forward in my former editions against the one interest, freight, bearing all the exit expenses, since

modern jurisprudence is doing much to ameliorate its position.

If freight still stands in a preferential position as respects other contributing interests, we must conclude the concession to have been made on one of two grounds,—either from mistake in observing what the true value of freight saved is; or from a desire to promote the carrying trade and to encourage navigation, by giving the shipowner a protective advantage when called on to contribute to measures which saved his freight from a threatened loss,—the amount of such saving to the shipowner being thrown on the other interests, to their disadvantage.

But whatever conventional privilege may be enjoyed by the shipowner, relieving him in the contribution of freight to General Average, advances on freight made by the merchant or shipper have no claim to similar relief or to participate in the shipowner's exception. The advance on freight is an actual payment, at risk during the continuance of the whole voyage, and is insurable to its full amount. If the ship be lost the whole of it is lost; and the advancer is under no expenses for navigating the vessel. He ought not therefore to contribute on a less sum than the whole advance.

AS TO THE LIABILITY OF ENGLISH UNDERWRITERS TO PAY GENERAL AVERAGE ACCORDING TO FOREIGN ADJUSTMENTS.

In order to complete the subject of General Average, it will be necessary here to speak by anticipation of insurance. It will be only briefly; and that important

system which connects itself with average so much and so often, will, in a later part of this volume, be treated of more at large.

When a ship and cargo are bound to a foreign port, and meet with some accident which gives rise to General Average Contribution, the original parties to the adventure are obliged to settle their proportions of the average as it is adjusted at the port of destination. In all places the master has the power of withholding from the receivers of cargo their goods until they pay or arrange for the payment of their quotas of General Average; and in some countries the settlement of the average is authoritatively conducted by Tribunals of Commerce, or by an official *Dispacheur*. But when ship, goods, or freight have been insured in England, the question arises whether underwriters are also bound by the foreign settlements of average. There was a strong and general belief that a contract of insurance made in England, or where English laws prevail, is to be construed according to our own laws, and not according to the laws or regulations of another country, of which the underwriter may be ignorant, and the risk he undertakes consequently, be uncertain by reason of his ignorance. It was supposed, in conformity with the case of wills and other contracts, that the policy was to be governed and made available by the *jus loci contractûs*, and not by the *jus fori* where the cargo had to be delivered up. Indeed, it is not in the spirit of our laws to administer justice by foreign codes.* It is admitted that in the conflict of laws the

* See *Greer v. Poole*, 5 Q. B. D. 272, M. L. C., where it was held that in the absence of a stipulation to the contrary, a policy must be construed by English law.

assured may be prejudiced, by being obliged to pay average abroad as adjusted there, and recovering from his English underwriters on an English adjustment; for the laws and regulations of most foreign countries treat General Average more liberally than our own, and make it include some items which we reject; chief among which are the wages and provisions of the crew during the forced detention of a ship under repair, &c. Thus the shipowner is relieved by most foreign systems, and a greater weight is often thrown on underwriters of ship, though in some cases these profit, as in those States where one-half of the value of a ship in her damaged condition is taken for contribution. It has during the last few years become so usual to insert in policies effected with companies, mutual insurance associations and private underwriters, a clause accepting General Average as adjusted abroad, that even in the absence of an expressed agreement, a tacit assent prevails, and there are few objectors to what has become a customary liability, which nearly approaches a customary right in the assured, at his option, so to make his claim.

This concession by insurers is most important as concerns merchandize. With regard to goods it is based on an apprehension of what is just, and it avoids a great deal of inconvenience and facilitates business; for the shipper of goods to a foreign port is bound to contribute to General Average, if it has occurred, on an adjustment drawn up in accordance with the code or the custom of the place. The consignee or agent cannot procure delivery of his merchandize unless he does pay Average when and as demanded. The claim is probably drawn up in a manner not in accordance with our own practice;

but the assured merchant has no subsequent remedy to recover back such difference. He therefore looks to his insurers to recoup him what he has been compelled to pay. And this is now almost universally done, with one exception which we shall have to consider, namely, the diversity, if any, between the contributing value placed on the object abroad, and the declared or contracted value in the policy of insurance; a question which insurers reserve to themselves the right to look into.

With regard to insurances on goods, little or no objection can be raised to a division when the foreign contributory value is higher than the value insured. Goods may go to a favourable market and realize more than the shipper expected; and it is only right that the profit obtained by the arrival of the interest at its destination should pay its share of the expenses by which its safe arrival was secured. In such a case the insurer pays General Average on the amount insured, and the proprietor of the goods pays an equal ratio on the surplus of value.

Although this principle seems equitable, it is not without legal precedent looking the other way. In the case of *Smith and others (Ewing's Trustees) v. Robinows and Marjoribanks and others* (20th July, 1876, Inner House, Court of Session, Edinburgh*) iron was shipped and valued in the policy of insurance at £825. In the General Average Statement, adjusted at Königsberg, the port of destination, the value taken for contribution was £1293. The policy stipulated to pay General Average according to foreign Statement, if so made up. The underwriters denied their liability for General Average

* Mitchell's M. Reg. 28th July, 1876, 244.

on a larger sum than that on which they had been paid premium.

The Lord Ordinary (Shand) in delivering judgment in favour of the assured said, that "according to the extent of the subscription, underwriters undertook to pay the proportion of the amount imposed on the insured as the average loss payable for the subject of insurance, as that amount was ascertained and fixed by the foreign statement, and not merely the proportion of the amount which by calculation might be found to attach to the shipping value as distinguished from the contributory value of the subject; and it appeared to him to be the more natural interpretation of the general terms used, and to be more in accordance with the presumed intention of the parties, that the foreign statement should be conclusive between the parties, as furnishing the precise sum for which underwriters, according to their several subscriptions, were liable." The full Court subsequently adhered to the Lord Ordinary's decision.

This decision, given by the highest Court in Scotland, must not be ignored or overlooked in any discussions upon the liabilities of underwriters on a foreign General Average Statement.

However the case may be with cargo, the position of the ship is clearly different; and arguments going to prove that a contribution required from the ship in a foreign port for General Average is claimable in full from underwriters, stand upon other and stronger ground.

The value of cargo at destination, though higher than the value as insured, is actual and permanent; but the value of a ship there may be merely speculative, and only

transient. If a ship of the real value of £10,000 is valued in a foreign port at £15,000 for contribution to General Average, when she leaves that port she does not retain her adventitious or erroneous value, but reassumes her real, and it may be, her insured value. In a place where all values are inflated or very much higher than in this country, it is possible that the elevation of price put both on ship and cargo may be in equal ratio. If so, the allotment of General Average in that port put on the vessel may be as just as if in some other, some place of low prices, both valuations assigned were considerably under their real and insured values. Relatively, in either place, the respective contributions of ship and cargo may be in fair and true ratio ; but when the ship's quota of Average is applied to her insurances, on the first supposition, only two-thirds would be recoverable from underwriters, whilst in the other case the whole contribution would fall on the insurers. And this happens from the accident of the amount of General Average being determined in two different markets, or from want of knowledge in those who make the valuations. We repeat, on a high scale of prices the merchandise may retain the value at which it was assessed ; but the value of the ship is transient, probably guessed at and unreal, and has no existence as soon as she leaves the port where the Average is adjusted.

If instead of fixing the ratio of liability to Average on ship and cargo by money value, it could be arrived at by a stated proportion, as one being a fourth or a fifth of that applying to the other ; or if, without numerals of value, the relation between the respective interests could be fixed by an algebraical formula, no question would

arise as to the liability on the ship's policy. It would pay its half or its fifth, or its more occult proportion of the General Average in full, supposing that the whole of the real and declared value of the vessel were insured.

Such are the arguments for consideration until a judgment from a sufficient English Court sets the matter absolutely at rest. At present the more general practice in adjusting is to compare the insured with the contributing value.

It must not be forgotten, however, that in *Harris v. Scaramanga*,* Chief Justice Bovill said, "It seems to me the general effect of a memorandum is to make the underwriters liable as for General Average for whatsoever the assured owners of the goods might be called upon to pay."

In modern policies the following clauses are sometimes introduced:—"To pay General Average by foreign Statement, or by York-Antwerp Rules;" or, "To pay General Average by York-Antwerp Rules, if in accordance with the Freight-Contract."

All the above remarks relate to General Average and incidental charges only. What relates to the repair or conservation of the thing insured, whether ship or merchandize, is not affected by a foreign statement, and is adjusted in the place or by the custom of the country where the insurance was effected. This part of a claim is Particular Average, and is dependent on the Special Conditions contained in the Policy.

The distinction taken with respect to charges is that those expenses which concern the condition of the subject-matter, its repair, conditioning, melioration, &c., such as

* L. R. 7 C. P. 481.

the repairing of the ship, the airing, rebagging and survey of merchandize, apply specially to the article so restored, repaired, or guarded from further injury. They are also called Particular Average or Particular Charges, and attach directly to the article so treated for its own benefit. On the other hand, under the clause "General Average per Foreign Statement," or by "York-Antwerp Rules," or following *Attwood v. Sellar*,* and possibly, after final decision, *Svendson v. Wallace Brothers*,† the charges attending a ship and cargo in an intermediate port, a port of distress, whether of adit or exit, together with rent of vessel whilst lying in harbour and of cargo stored in a warehouse, are classified as General Average, and underwriters are taken to know the English law and foreign codes or customs; but the insurers are not bound by any classification in a foreign Adjustment or to Particular Average on ship or merchandize.

Of course, underwriters are not concluded by an unauthorised or erroneous statement adjusted abroad. Any violent error or omission would demand correction. But inasmuch as it might require in case of a foreign statement in error, to send out a commission to the place of adjustment, an expensive measure, foreign statements are generally accepted as being customary and correct.‡

* 4 Q. B. D. 342; 5 Q. B. D. 286.

† 4 Asp. M'L. C. 550.

‡ There are still some places in or bordering on Europe where no code or custom of General Average exists. In a case which came before the writer where an Average had been adjusted in Constantinople, but at the Russian Consulate, and a commission was issued from this country to take evidence on the adjustment; in answer to the commissioners' question as to the practice in Turkey relating to Salvage and General Average, the characteristic reply given by the persons under examination was, that "the Koran is silent on the

In applying a foreign General Average Adjustment to a policy of insurance on ship, by which there is also a claim for repairs, *i. e.*, Particular Average, a conflict may arise in the allotment of some expenses of repair. The foreign adjuster may introduce some portion of repairs in his General Average column, which under the English view are not so claimable, and must in the first instance form part of a claim for Particular Average. This difficulty is easily got over in the English adjustment of Particular Average, by giving underwriters on ship credit for the amount of repairs brought by the foreign Statement into General Contribution.

Fourthly, the liability of an underwriter under the foreign Average clause is to be confined strictly to what he undertakes by that particular stipulation : it is not to be extended to take in a farther onus. If the clause is "to pay General Average according to foreign statement," he is not bound to pay the special loss on the interest insured, called Particular Average, as adjusted abroad. But under the name of General Average are probably included the expenses which are differentially called salvage charges, and also those special expenses on the particular interest which the foreign adjuster places in a column devoted to that interest. Far less, in my belief, is the underwriter under a clause "to pay General Average as adjusted abroad" involved in indirect or distant consequences arising out of the Average transaction, or for the action of the commercial laws generally of the place where the claim is adjusted. Thus, by the commercial law of Holland, if in a case of Average the subject of Salvage and General Average." No laws consequently existed.

result of an adjustment throws on the shipowner a sum larger than the value of the vessel and her freight, he can, by abandoning his ship, which is then sold, and giving up the balance of freight above wages, relieve himself from all further burthen; which burthen falls on the proprietors of cargo, who have to pay the shipowner's onus in excess of proceeds of ship and freight, in addition to their own. And this, though what they are paying for is composed of repairs to the vessel and other matters which do not concern the cargo. It cannot be admitted that an English underwriter under the mere clause "to pay General Average according to foreign statement," or "as made up abroad," is to be fixed with such consequences and involved in the general action of the Dutch laws. In this particular instance we have the analogy of English law to guide us; for when by proceedings *in rem* in Admiralty upon a Bottomry bond, cargo has to be sold to pay the amount in defect after sale of ship and appropriation of freight, the absorption of the proceeds of the goods sold for that purpose, and the loss on such sale, do not fall on the underwriter of the cargo but on the assured; the underwriter not being bound by all the action of commercial laws or to every mercantile risk, though remotely connected with sea perils.

The case of *Greer v. Poole** should be conclusive in such a case of "conflict of laws"; for it distinguishes the underwriter's liability under his contract of insurance, interpreted by the *lex loci contractus*, from other liabilities to which an assured may be subjected by the *lex fori*, the municipal or the mercantile law where the

* Q. B. D. 272.

contract terminates. By the "foreign General Average clause," he agrees to pay all that falls on the interest he has insured *quâ* General Average; but he has not bound himself by his contract to the extraneous laws of bankruptcy, insolvency, &c. Justice Lush, in reading the judgment of the Court, would not allow against underwriters a claim for loss on cargo sold to make up the deficiency on a Bottomry bond over and above the proceeds of the vessel and her freight, either on the ground of such loss being General Average, or by "perils of the seas." (See *ante*.)

Although the underwriters make themselves liable, by stipulation, "to pay General Average by foreign statement, if so claimed," or to pay the same "by English or foreign statement, at the assured's option," this choice does not give the assured the right to send papers away from this country to have them adjusted in another, because the regulations of that foreign place would give him a larger recovery from his underwriters than the adjustment made in this country. "Foreign statement" really signifies a statement drawn up at the place where the voyage terminates; not a general permission to adjust General Average in any country the assured pleases; nor are the concessions of insurers to be abused or carried beyond their intention; and the judicious rule of law is to be remembered that a condition is to be construed against him for whose benefit it is inserted.

The rate of exchange at which the currency of the country in which a foreign statement has been adjusted is to be taken in claiming on English underwriters, has occasionally presented difficult questions; and amid the

violent and sudden fluctuations of exchange in the United States during the American international war important and obstinate discussions concerning exchange arose. Nor can it be said that unanimity on this subject has yet been obtained. The question is too long and technical to do more here than state it, and to give an example of its difficulties. Suppose a ship and cargo under Average and after jettison of some of the goods arrived at her place of destination, San Francisco, when the exchange was 200; and that valuations of ship, cargo, and freight, including claims for what had been thrown overboard, were called for. Suppose that by the time the statement was completed—three or four months afterwards—exchange had receded to 130, and that at the moment when contribution was demanded from one of the contributaries, who had a counter claim against the concern for cargo jettisoned, the exchange had advanced to 160,—At what exchange should the quota of Average be reduced in making a claim on the English underwriters? Suppose further, that at the last exchange the value given for contribution in San Francisco would agree with the declared value in the policy; that at the first exchange the contributory value would be below, and at the second rate would be above, the policy value. Let it be remembered that the quota of contribution would be in sympathy with the contributory value, and would be greater or smaller at the different rates, and that the recovery for jettisoned goods would be similarly affected. An exchange which would bring the contributing value within the policy value would also reduce the amount of English money to be received from the underwriters; whilst a higher rate, which increased the

sum of General Average, would also raise the contributory value above that in the policy, and leave the assured to contribute himself on the margin of value. In the endeavour to solve these questions on a basis of right and not simply of expediency, other and more recondite considerations have to be entertained—such as, what is the true meaning and effect of the appreciation of gold, or depreciation of paper, on all the values; how far it affects the English underwriter; how far the contributing consignee, being at the same time a claimant for goods jettisoned, and also the shipowner, are to be affected; and whether if by substituting an algebraic formula of proportions, instead of adopting given values at any moment, which would be afterwards liable to be compared with other temporary valuations influenced by a fluctuating agio on gold, one ground of difficulty might not be removed. As a small volume might be filled with these discussions, they must not be pursued more at length in this place. Towards their settlement it must be always borne in mind that the assured is not to make a gain from the underwriter by the action of exchanges, neither should he by any voluntary adoption of a rate of exchange find himself a loser. How important the question of exchanges may at times become, is shown by the fact that during the war in the United States the paper or currency dollar was depreciated, on more than one occasion, to the value of two shillings; at par of exchange it being worth about four shillings and twopence. The fluctuations of exchange, depending on political facts, were often extreme and rapid.

Although the doctrine which has been inclined to in

this section, is, that an English underwriter on a policy not containing the foreign General Average clause, binds himself by his contract according to the laws and usages of this country, and claims to have his liability determined by those laws and customs, and not by the various laws and regulations of other countries, except universal custom to the contrary can be shown against him—a doctrine which seems just and reasonable, there are some persons who hold an opposite view. The principal English text-writer maintaining a British underwriter's liability on a foreign adjustment is Sir Joseph Arnould. His statement of this opinion is contained in a marginal note,* “The underwriter is bound by a foreign adjustment made according to foreign usage.” And in his text the doctrine is expanded as follows: “1. That the underwriter is in all cases bound by a foreign adjustment of General Average, when it is rightly settled according to the laws and usages of the foreign port. 2. But that unless it is clearly proved to have been settled in strict conformity with such laws and usages, he is not bound thereby in any case in which he would not be bound in this country.” He relies on two cases given by Park in support of the first paragraph, viz.: *Newman v. Cazalet*, and *Walpole v. Ewer*; and for the second paragraph on *Power v. Whitmore*; but the second dictum is not important, because it applies equally to a policy containing the clause “to pay General Average on foreign statement.” And both the underwriter signing that clause and the underwriter not agreeing to it can throw on the assured the onus of proving that his state-

* Arnould, 3rd edit., *Maclachlan*, p. 821.

ment made up abroad is in accordance with the laws and usages of the place.

. In fine :—The payment by English underwriters on goods of General Average and charges as adjusted at a foreign port of destination is almost universal, even when no stipulation to do so is inserted in the policy. Convenience and, now, custom are greatly in favour of this arrangement, even without its being enforced by the case in the Scotch Court, mentioned above, of *Smith v. Robinows and Marjoribanks*.* Yet we must not lose sight of the fact that foreign General Average is hardly claimable as of right, whilst the sound principle of law remains, that a contract is to be interpreted according to the *lex loci*, and not by the *lex fori*.

* Mitchell, M. R. 28th July, 1876, 244.

PART THE SECOND.

OF AVERAGE CONNECTED WITH INSURANCE.

OF INSURANCE ITSELF.

WE have now arrived at that point where Insurance is not merely incidental, as considered in the previous section, but enters as an essential part of the subject,—in fact, becomes the groundwork of all that has to be said about it. With regard to General Average—that contribution made amongst certain persons whose interests are associated for a particular period or in a particular adventure—insurance may or may not be connected, but it is not a necessary accompaniment. Here, on the other hand, the contract by which one person binds himself under certain limitations and conditions to take on himself a definite risk belonging to another, is the first cause of every question that can be agitated about Average. It is not intended to enter largely on the subject of insurance in this place. It is one too extensive and important to be comprised in a chapter; and I thought it desirable to publish a separate work upon it.* All that is now required is to give in short form such a general account of the system and the sea-policy as will prepare the way for considering those parts which, in an especial

* *A Manual of Marine Insurance.* Smith, Elder and Co.

manner, are connected with Average. Whilst, therefore, writers whose theme is Insurance look upon Average as a subordinate part of their design, and treat it though as an important yet as a collateral subject, we, on the contrary, must put it in the first place ; and, proceeding in an opposite direction, must consider Average both as existing with and without insurance : so that in the light by which we view it, Average may be compared with the trunk, and insurance with a large and material branch proceeding from it.

Insurance is a system by which some classes of loss sustained by one individual are borne by many individuals. The essence of insurance is the subdivision of a given risk or contingency. The object of all insurances, whether marine, fire, or life, is to distribute and equalize losses. It is not pretended that insurance can *prevent* losses. Shipwrecks and fires and deaths will take place whether the property or the person be insured or not ; but by the system of insurance, the loss when it happens is so divided among many persons that it falls lightly, and is comparatively unfelt among them ; whereas were it borne by one sufferer it would be heavy or ruinous to him. In the words of the Act of 43 Elizabeth, cap. 12, “Whereby upon the loss or perishing of any ship there followeth not the undoing of any man, but the loss lighteth, rather, easily upon many, than heavily upon few.”

That which is paid for so great an advantage is named the *Premium*, or the price of insurance considered as a purchaseable commodity.* Those who deal in

* The word *premium* does not occur in the Lloyd's policy, where term used is *consideration*. *Premium* is strictly a misnomer, inas-

insurance are to live by it, as is expected by the vendors of every article of commerce. It follows, then, that not only must the premium be an equivalent to the risk run, but it must be something more; it must have a sufficient margin beyond the risk, to provide a profit for those who sell this species of security and to meet the ordinary expenses of carrying on their business. From which this consequence flows, that a person constantly insuring loses as much, nay more, than one who does not protect himself; but with this distinction,—that he loses piecemeal, little by little, in a manner known and expected and so provided for; whilst the other, without the wholesome check of a constantly outgoing expense, loses wholesale, at a moment that cannot be calculated on and in a way that may overturn all his expectations. By insurance the premiums become as much a part of the price of an article when sold as do the freight and any other charges; so that, again, the loss is subdivided, and it falls in infinitesimal portions on every purchaser in the whole community. Insurance companies and underwriters, as the separate insurers are called, act, therefore, as a savings bank does; they are useful in being the means for a gradual accumulation towards losses, and providing the fund at once when it is called for. If it be urged that insurance companies defeat the object, as I have stated it, of the system, because a single company will often insure the whole interest which a shipowner or merchant wishes to cover, and that, therefore, when the loss comes, it is still paid by one individual office,—it is to be answered that the

much as its meaning is *reward*. If a Latin word be used at all it should be *pretium*, as being the *price* of insurance.

company itself is only the working medium of an aggregation of individuals, its shareholders, and that each loss falling upon an office falls in detail in small quantities on each proprietor.

The rise of the system of insurance entirely altered the aspect of commerce. The olden merchant, the man who traded before this advantage had developed itself for his use, was always in danger of being ruined by accidents of the elements, and might be reduced to beggary by the sinking of his rich argosy. He, as a general rule, travelled with his venture, and therefore must have been a hybrid between a capitalist and a seafarer. Now, there are few Antonios, few Merchants of Venice, whose lives even may be jeopardised if the winds and waves prove treacherous. There are none except by their own choice. It is true that some very extensive shippers of goods, and some owners possessing a large fleet of shipping, run the risk themselves by not insuring;—*but then they do it on the very principle of which we are speaking*; it is because their property is dispersed in many bottoms—one ship sinks and another swims,—that the mass is kept safe by one vessel or one portion of goods insuring another. The shipowner or the merchant thus becomes his own insurance company; and as there is necessarily a profit supposed in the system of insurance, so he, by keeping account of the premiums saved which might have been paid, and the losses he actually sustains, may find an advantage in the course he pursues. But the plan of running the risk, when transactions are very limited, is bad economy, and is highly to be deprecated as far as security and freedom from anxiety are concerned.

As to whether the Policy of Insurance is a Contract of Indemnity.

This is the often recurring question, the point upon which assurers and the assured are so frequently at issue; and it will be well to say a few words on the subject before proceeding further. A policy-holder sometimes asks in reference to a claim he has on his insurers, "Have you not granted me an indemnity? Do you not stand in my shoes? If you do not deny this, all the loss and the expense which I suffer in respect of the subject-matter of this insurance you must pay; otherwise I am not, according to my idea, insured; it is no use to insure; the premium is thrown away," &c. The underwriter denies that he ever took upon himself by his contract this plenary kind of insurance; but the assured is confirmed in his view by finding it stated in some writers on the subject that a policy is a contract of indemnity.* The difficulty arises from an unguarded use of terms, or, rather, from the use of a vague expression. The truth of the matter is, that a policy is a writing of indemnity *in a limited sense*; it is protection restricted by certain conditions and provisoes.† Perhaps in this light the assured will say, then that is

* So in the case of *Dalby v. India and London Life Assurance Company*, the Judge said, "Assurances on Marine risks are contracts of indemnity."

† Thus, in *Irving v. Manning*, 1 H. L. 307, the Judges thus expressed themselves:—A Policy of Insurance is not a perfect contract of indemnity. It must be taken with some qualifications. And this dictum was quoted in the judgment of the House of Lords, in *Aitchison v. Lohre*, H. L. M'L. C. 168.

not what he understands or means by an indemnity. Probably not : in which case it is a pity that the term should be used at all ; for words ought to convey definite ideas, and not to be subservient to confusing them. Yet there is no mystery in the matter. The contract when calmly considered is a very reasonable one. The underwriter or insurer agrees for a stated premium to take upon himself certain risks or contingent liabilities that affect the interest which the proposer wishes to insure. What those risks are is to be determined, first, by the policy itself, which states them concisely ; and those risks which do not fall under its enumeration either expressly or by implication are excluded by the insurer. It is true that the list ends with a general undertaking, which leaves the door very much open to questions upon its meaning, in the words "and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ship, &c., or any part thereof." So that, secondly, it is necessary to have some other exponent of what the exact risks are which the underwriter engages to protect against. And this definition must be made by law and by usage : the former to be gathered from the writings of jurists and the decisions of courts, the latter from the experience and knowledge of persons conversant with the somewhat fluctuating rule called "the custom of Lloyd's." By the scale of premiums given, and by the introduction of conditions, a protection more or less complete may be agreed upon. There are many policies, now, which stipulate that whatever sum the assured may be called upon to pay by foreign adjustments of General Average

shall be repaid by the underwriter. There are policies in which even the solvency of the underwriter is guaranteed. On the other hand, some insurances are against the risk of total loss or some other contingency, only ; and other policies contain various special clauses telling for or against the security of the person insured. So that the question resolves itself into a matter of premium or price ; and *indemnity* is not to be considered as being an absolute and indisputable thing, an univocal term, but a matter capable of degrees, and one which may be rendered more or less complete ; yet I think never quite so as to place the insurer in every possible situation with respect to loss and contingencies, in the exact position in which the assured himself might be placed as the possessor of that ship or merchandise or other interest. Indeed, when the technical nature of the conditions is considered on which a claim depends,—in respect of stranding, for example,—or when the arbitrary deductions of thirds from claims for repairs of ship are remembered, it will be acknowledged that the protection granted under a policy of insurance is only a limited one, and that on the bare term of *indemnity* itself no argument should be raised.

It is worth while saying, in order to set this matter in as clear a light as possible, that many words are used either in an exact and scientific manner, or loosely and colloquially ; and that when any serious question of what is meant arises, it becomes necessary to explain in which sense a given word is employed. If the assured—for it is he nearly always who utters the maxim that insurance is indemnity—considered the strict import of the word indemnity, he would often find it desirable to substitute

the term *protection* for indemnity, and it would better convey his meaning. He intends by it that the underwriter is to keep him in the same position with regard to the interest insured, as if no accident or loss had happened; but he leaves out of sight that an indemnity in its true sense would do no more for him than this; and the latter position is certainly not his intention. Thus, on an insurance on goods valued at £1,000, suppose half to be lost on the voyage, and that on arrival the remaining half produce only £400, by reason of a fall in the market value. An indemnity would only allow the assured to recover £400 on his policy for the loss of the other moiety, because in paying that, the underwriter would place him in the same position as if his whole cargo had arrived. Nevertheless he demands from them the contracted value of £500 for his half cargo, and thus he is more than *indemnified*, and is put in a better position than an arrival of the whole would have placed him in.

Take another case. Suppose in respect of the same insurance that one half of the goods were thrown overboard for the general benefit: and that on the ship's arrival at the port of destination, in consequence of a rising market, the half cargo which reaches its destination produces £600. In this instance the assured claims to be indemnified. He claims from the shipowner, as representing the general concern, the sum of £600. He no longer goes direct to his underwriters for the contracted value in his policy; but he demands, and that quite justly, to be reinstated for the sacrifice of his merchandise at the current price on the ship's arrival, by a contribution from all who benefited by that sacrifice. He

seeks indemnity. Now let the other contingency be supposed. Let the value, on a fallen market, be £400 for the half cargo which arrives: the merchant's claim against the general concern in respect of the half of the goods jettisoned is, accordingly, £400; and he is indemnified when this sum is made up to him by contribution. But the assured merchant is no longer contented with a bare indemnity; he has a remedy on his policy, and he now does not press that it is a contract of indemnity, but an absolute engagement, by which underwriters have bound themselves to pay him a stated value for his goods, should they be lost. Here half are lost to him; he claims, therefore, £500, as agreed for that moiety, and there is absolutely no answer which the underwriters can successfully urge against his claim. To say that the goods are lost by jettison is to say nothing; for jettison is one species of total loss, and they have engaged to hold him safe against all total losses, besides other risks. To plead that it is customary to recover such a loss, not on the policy but by general contribution of all the interests, is useless; for custom cannot contradict an express written contract; and by the policy, loss by "jettison" is specifically provided for as one of the risks accepted by the underwriters. Neither could it be successfully shown that for the assured to restrict himself to a direct remedy against his co-adventurers is universally the custom, however general and convenient such a practice may be.

The result of all that has been said amounts to this, that the word "indemnity," when applied to marine insurance, is used loosely and conversationally, and is not to be pressed to its exact meaning, by which neither

the underwriter nor the assured would consent to bind themselves.

The last utterances on this subject are those of a distinguished jurist, Lord Justice Brett, who delivering the judgment of the Court in *Castellain v. Preston* (*The Times*, 12th March, 1883) uses words which certainly seem to conflict with expressions quoted above, in the House of Lords, in *Aitchison v. Lohre*. Brett, L.J., says, "The foundation of every rule of marine and fire insurance law was that the contract was one of indemnity, and that the assured should be fully indemnified, but nothing more. Any proposition which infringed either part of that rule could not be upheld." This announcement is very wide and inclusive: but the circumstances which give rise to this expression differ from the facts in *Aitchison's Case*. That was on a marine policy. The greater number of marine insurances on goods are contracts in which an agreed value is stated in the policy. On such insurances, whether in result fluctuations of markets would leave the assured a gainer or loser by his policy is immaterial: it is a door which cannot be opened: and even undeclared policies are treated with leniency when a loss occurs, when persons of honour on both sides are dealing together. In *Castellain's Case*, which was on a fire policy, great injustice would have been done had not the principle of indemnity been invoked; for the seller of the property, which was the subject-matter of the insurance, would distinctly have recovered one sum twice over.

THE MARINE POLICY.

The form or instrument by which sea insurances are effected is a time-honoured, quaintly-expressed document, which has already been modified in various particulars by more recent offices and associations, and which would, with great advantage, be more generally altered and modernized, but from the fear felt by some persons respecting the legal decisions which have been given on nearly every sentence of it, and many of which hang on a particular word or phrase. However, besides the old form of sea-policy, there are now, as has been mentioned, variations of it in use. The first varied reading was introduced by commercial men who objected to the use of the sacred name, which occurs twice in its text, and which also is found repeated in that short agreement called the Bill of Lading. No doubt in former days, when the safety of the ship and goods was so intimately connected with the life of the merchant and owner, the adjuration was used with a religious feeling; but at present, with the change of times and the expansion of commerce, such expressions have become a mere form, and, in many people's mind, an irreverent one. Other slight changes, too, were made to adapt the policy to English insurance companies, and to those societies in India which have their head offices in the Presidencies; and by the shipping associations or clubs established for the purpose of mutual insurance in many places along the coasts of Great Britain. The latter, although they take the old policy in general for their basis, attach to it a paper of special conditions or rules which have been agreed upon by the members, and which considerably

modify the contract, and differ in nearly all the clubs. "It is very probable," says Mr. Marshall, "that the form of a policy of insurance, nearly similar to that which we have now in use, was introduced into England by the Lombards,"—consequently five or six centuries ago. This writer designates the policy as "extremely inaccurate, and unskilfully framed;" and Mr. Justice Buller said of it that "it has always been considered in courts of law as an absurd and incoherent instrument." However, my object at present is not to find fault with the prevailing form of policy, but to describe and explain it. Two especial points are necessary to its validity as a legal instrument. It must bear an adequate stamp, and it must recite that the consideration, that is the premium, has been received by the insurers who sign or "underwrite" it.* For this document is not like a lease or other mutual agreement to which both parties concerned affix their signatures; it is of the nature of an undertaking by one party, who alone signs it. As such the document is called in law a "deed-poll," in distinction to an "indenture," which is in two parts, and is signed by both parties.

The policy, it will be seen, consists of a printed form interrupted by spaces, in which is written the special matter of each individual case; such as the names, dates, and places, species of interest, rate of premium, and all particular conditions which are to form part of the agreement.

With regard to conditions three things are to be

* In the policies now used by many insurance companies and associations the acknowledgment of receipt is changed to a promise or undertaking to pay the premium.

especially observed, because they have been laid down by the highest authorities. They are,

First,—That a written agreement overrides the printed one when the two are oppugnant.

Secondly,—That those special written clauses, such as that called the Average clause, are *cumulative, and not restrictive*. That is, that they are *farther concessions to the assured* beyond what he can demand by the bare printed policy, and are not to take away any privilege he had before their introduction.

Thirdly,—That conditions are to be construed against the party for whose benefit they are introduced.

These two last dicta of eminent judges are not contradictory of one another, as a superficial reader may suppose, but are an instance of the refinement that has been arrived at in the science of justice. Thus, the agreement “to pay Average on each package,” or “on every fifty bags,” does not take away the assured’s primary right to recover on the whole interest; neither does the clause in insurances on wood “to pay Average on deck-load as if separately insured,” or the still more inaccurate and misleading expression “deck-load to be considered a separate interest,” take away the assured’s privilege to claim, if so it suits him, on the whole cargo, above and below deck; because these clauses are cumulative, and when inserted were intended for an additional easement or protection to the assured; and are not now to be construed against him, or to be used in restriction of his rights of recovery.

The policy, such as we find it, being of such important and universal use, it should never be forgotten that in its interpretation no sophisms are to be allowed.

Within its four corners the objects and scope of an insurance are expressed in printed and written words. Where a written clause does not oppose the printed form, but runs in the same direction, the variations introduced by the assured are cumulative or additional benefits to the holder of the policy. The law looks at it in this manner, and is very jealous of allowing an alleged custom to defeat a distinct contract.* In cases of doubt, or when words of vague meaning have been used, the custom of Lloyd's, or of a trade, may be advantageously adduced. It will be received in Court and before arbitrators, and will be taken into consideration by an Average Adjuster in stating the claim on a policy.

The policy consists of three parts;—the body; the memorandum; and the signatures or subscriptions.

After having given this very well-known instrument at length I shall, in proceeding with my subject, endeavour as much as possible to follow the order in which the matter to be explained or discussed is there arranged. For the sake of generalisation I must here and there deviate from this rule, but it will be convenient to adhere to it as nearly as is practicable.

COMMON FORM OF POLICY.

“S. G.† IN THE NAME OF GOD, Amen.

“As well in own name, as for and in the Name
and Names of all and every other Person or Persons to whom

* It is now, however, necessary to refer to the recent appeal in *Burton & Co. v. English & Co.*

† The exact meaning of these initials is not known. They are supposed either to be intended for *Ship* and *Goods*, indicating that the form of policy is adapted to both subjects of insurance; or to stand for *Salutis Gratiâ*, with which words, possibly, some older instrument of insurance commenced.

“Touching the Adventures and Perils which we the Assurers are contented to bear, and do take upon us in this Voyage ; they are, of the Seas, Men of War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment, or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof. And in case of any loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants, and Assigns, to sue, labour, and travel for, in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any part thereof, without prejudice to this Insurance ; to the Charges whereof we the

Assurers will contribute each one according to the Rate and Quantity of his sum herein Assured. And it is agreed by us the Insurers that this Writing or Policy of Assurance shall be of as much force and effect as the surest Writing or Policy of Assurance heretofore made in *Lombard Street*, or in the *Royal Exchange*, or elsewhere in *London*. And so we the Assurers are contented, and do hereby promise and bind ourselves each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators and Assigns, for the true performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance, by the Assured
at and after the

Rate of

"IN WITNESS whereof, we the Assurers have subscribed our Names and Sums Assured in

"N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed, are warranted free from Average, unless General or the Ship be stranded. Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average under Five Pounds *per Cent.*, and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds *per Cent.*, unless General or the Ship is stranded."

OF PARTICULAR AVERAGE ON SHIPS.

The policy states that the insurance it grants is on the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship. And then it enumerates the adventures and perils the underwriters* take upon themselves, or, as it is expressed, "are contented to bear." And the object of the enumeration

* Insurer is a more comprehensive word than underwriter. The latter means, in common parlance, an individual insurer, such as those who transact their business at Lloyd's Subscription Room in London. But the term underwriters and underwriting are so universally known that I frequently adopt the former,—always, however, meaning *insurers*, whether companies or individuals.

appears clearly to be, if we consider the greater simplicity of the times which gave this contract birth, to show the fulness of the protection the policy gives ; and not by recounting certain risks to imply the negative as to any other marine risks omitted to be named, and so to restrict itself entirely to those set forth. Yet in modern times we see the nicest distinctions drawn between the exact risk mentioned and another approaching it very nearly in character ; and this in spite of the sweeping generality with which the catalogue concludes, “and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship, or any part thereof.” The list itself consists of the “perils of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said (goods and merchandises and) ship, &c., or any part thereof.”

There is a postscript at the foot of the policy, called the Warranty or Memorandum, and to which attention is specially called by a *Nota Bene*, in which it is stipulated that “the ship is warranted free from Average under three pounds *per cent.* unless General or the ship is stranded.”

The above is the basis of the contract made by the underwriters, for the consideration of the premium which they acknowledge to have received in the body of the policy.

Perils of the Seas.

We have first to consider the perils of the seas, as earliest in order in the policy. These comprise all the accidents of the elements,—water, air, fire, and earth. All damages caused by the violence of waves, by the force of winds, and by resistance of rocks, sands, &c. are Particular Average ; and Particular Average is a risk undertaken by the underwriters. But to this liability there are limitations ;—the written one being, that the repairs of such damages must amount to three per cent. of the ship's declared value ; and two limitations established by usance, —the first, that the damages must not be of that ordinary character which scarcely any ship can be free from on any service, and which are denominated *Wear and Tear* ; the second, that before the sum of the damages is compared with the value of the ship in the policy, one-third part shall be deducted from the new work on account of *Melioration*,—that is, the improved condition of the ship, by those repairs, so far as those repairs extend.

A number of minor but important rules supervene, all of which have to be kept in view when an Average is being adjusted. Several of them will be mentioned as we proceed ; and some are so apparently insignificant or occur so unfrequently that it would only encumber the work with minute details to enter into them. It is the Average Adjuster's business, however, to apply every one of them as the occasion arises to which they attach.

The damage that seas can do to a ship is by striking her upperworks, by which bulwarks and stanchions, boats,

spars, harness and water casks, ropes and other stores and materials may be carried away or broken ; the chain plate bolts may be broken and the rigging consequently loosened ; the sea may carry away or damage the rudder, the capstan, and windlass ; it may break or spring masts and yards, and burst sails ; it may cause the vessel to roll so as to carry away her topmasts and spars ; it may burst hatches, break skylights, and get below into the cabin, destroying thereby perishable stores, charts, books, instruments, and furniture ; it may throw the vessel on to her broadside, or, as it is frequently said, on her beam-ends, and threaten her with destruction ; it may strain the upperworks and the decks so that water enters the ship's hold and requires her to be freed from it by the use of the pumps ; and it may shake the vessel throughout so violently as to wrinkle the metal sheathing and strain her, causing a derangement of the caulking, the springing of butts and the opening of seams, so as to make the vessel leak below ; it may by falling on the decks break some of the beams and other substantial parts of the fabric ; sweep away the round-house, cooking-house and other erections on deck ; wash away the ornamental work from the stem and stern ; and it may break the chains or ropes by which the vessel is moored. And then, if the vessel is propelled by steam the dangers and accidents her machinery is exposed to are abundant. Propellers lose or break their blades, or themselves drop off the shaft ; crank-shafts break ; and indeed every portion of the wonderful mechanism which goes to the making of a steam-engine has a liability to give way in perils of the seas, and often, in consequence, to endanger the ship and all that she contains.

About the majority of the above losses and injuries no difficulty will occur. When the vessel arrives at her port of destination, or reaches a port of distress, a survey is held on her to ascertain and specify the damages she can be observed to have sustained, and the vessel is properly repaired and refitted. These repairs form a claim on the policy against the underwriters. What is necessary to be observed is, that the insurers only pay for what has really been rendered needful by accidents. It often happens with ships which are not new, that in repairing the fresh damages a number of old sores and imperfections come to light, and are, very properly, remedied as the work proceeds. But these repairs appertain to the owner and not to the underwriter, and must be selected and put aside by the Adjuster. His judgment must be exercised in comparing the account he gains from the protest and the verbal explanations of the captain, with the surveyor's reports, and the bills of the shipwright and the various tradespeople employed in repairing and replacing damages. Nor must he allow an extravagant or unnecessary expenditure in repairs, or permit any additions to be made to the ship's fabric, as by lengthening her; or any substitution of superior materials for what were taken away, unless in some places where the former are the only materials procurable.

From the repairs to wooden ships which are allowable, both in material and workmanship, one-third is to be deducted for melioration or improvement; except from chains, from which only one-sixth is to be taken, and from anchors, which are allowed without deduction. When the resheathing a ship with metal is permissible a

special rule applies, consequent on the gradual and certain wastage of copper and copper-alloys on a ship's bottom by oxidation and the galvanic action which takes place. A weight of metal equal to the quantity stripped off is allowed in full; and the new copper or metal for places where the sheathing has actually been torn off and lost, together with the bolts and nails, &c., and the labour of stripping off and working on, are subjected, like other materials, to the deduction of one-third.

Certain expenses, however, are excepted from reduction, though it is not very clear upon what grounds. Such are hire of the shipwright's dock and ways; use of shears, stage, and other utensils; labourers' wages, docking and undocking vessel and clearing away rubbish; boat-hire; and a few other small expenses. These are looked upon as accessories, necessary to the effecting of the repairs, yet not increasing the value of the materials used. But then the same argument is often used by shipowners against the *thirthing of labour*, which they say is used to put the new material into its place, but is not itself a meliorated portion of the ship, and would have been required even had only second-hand materials been employed in the repairs. There is, strictly, perhaps, little or no distinction; and the true view is, that the repairs should be looked at as a unity and not be dissected. The new materials would be useless to the ship without the labour, and the labour could not have been employed without certain conveniences; these three things united form the repairs, and produce the melioration. The cost of documents, the protest, surveys, &c., may be assumed to stand on a distinct ground, and are

properly introduced without deduction, as are the charges incurred before repairs, and evidence necessary to establish the claim on the underwriters.

When the preceding paragraph was first written, sailing ships, principally built of wood, formed an immense majority in the mercantile fleet of England. Now, iron and steel are the great materials of construction, not for hulls only, but for masts and yards; nor is metal confined to steamers, but is used very greatly also in vessels propelled by sails. The new order has called for the new rules in the treatment of Averages, and has introduced many new conditions in effecting insurances on iron steam ships. The metals of which they are built being considered so much stronger and so much more durable, a longer time is allowed before deductions for melioration are made, and when made, a smaller reduction of cost is considered equitable. Such in late years has been the competition among insurers, that one seems to outbid another in the advantages they offer to shipowners. Possibly these attractions may have been carried too far: it is not for the writer to say, as he is not the judge; but the changed and changing state of rules and conditions, with their provisoes and exceptions, has introduced corresponding alterations in the adjustment of Averages. Nevertheless, the principle remains the same, namely, that when insurers pay for the repair and re-instatement of a ship, the idea of indemnity comes in; that whilst they put the assured in as good a position as he had before his vessel was injured, they are not to be called on for *improvements*, or give him a new ship for one which had grown old in his keeping, or the machinery of which had passed its first youth.

First Voyage.

If the ship be quite new, the repairs are allowed in full, free from this reduction—which is perfectly reasonable. Some insurance associations hold a sailing vessel new for the first year, others eighteen months after she is launched, which appears an equitable rule. The general test of newness, however, is that she be on her first voyage. This is by no means satisfactory. With a coasting vessel or collier the first voyage will be one passage from Sunderland to London and back, occupying probably a month ; whilst a foreign-going ship may proceed from England to India, China, the Pacific and home, in a continued chain, making up together one long voyage which may expend a year and a half in its completion. Under certain circumstances even more time may be included in a first voyage : for if the vessel be one of colonial build, she may proceed from her building port to this country, and even bring a cargo, provided it be shown that the primary object of such cargo was not its profit but to fill the ship and make her fit to perform her passage,—and the journey hither is not to be reckoned her first voyage ; and so she may even afterwards go that round of voyages spoken of, occupying a very lengthened period. This causes the privilege of first voyage to act very unevenly ; and it would be better that all vessels should be considered new for twelve months after launching, or for certain relative periods dependent on class. Iron ships have for reasons assigned in the preceding paragraph a longer term allowed than those built of wood.

Temporary Repairs.

There is one kind of repairs which is allowed without deduction of a third; viz., those temporary reparations done in ports where the vessel cannot be restored perfectly and permanently, but which may suffice to allow her to complete her voyage. These repairs, having to be taken away afterwards, are clearly not to be held in any way to be meliorations, and must be charged in full.

Of Second Repairs.

There is considerable difficulty in dealing with repairs or replacement of parts of a ship, whether in her body or the rigging, sails, &c., which are damaged or destroyed a second time. There can be no argument that the second repairs are better than the first, supposing them to be effected at a short interval afterwards; yet it has been thought objectionable to break through the rule of *thirthing*, or deduction for "new for old," in such cases. The original guide was the newness of the whole ship, not the recentness of particular repairs. And as it is very probable that old work and new work would be destroyed together, and that it would be very difficult to assign limits to each, and that in attempting to separate them a door might be opened to error, it is, possibly, the better plan to leave this unattempted, and to deduct one-third from the whole. There seems to be a distinction observable in those detached parts of the ship that have a separate individuality, such as sails, parts of the rigging, boats, stores, &c. There is not the same difficulty about a stay, or a mast, or a boat, all having been

recently put on board and then carried away or destroyed, as there is respecting integral portions of the ship's fabric; and they may be equitably allowed in full without impugning the justice of deducting a third in the repairs just mentioned. This is one of those finer points which must be reserved for the discrimination of the Average Adjuster, and it cannot be reduced to an inflexible written rule.

The Theory of Thirds.

It may be very naturally asked how the usage became established of deducting a uniform proportion from repairs, considering how very different the condition and the age of individual ships are likely to be; and it may be inquired whether the custom is a good and justifiable one. In answer, it must be admitted at once that the action of this, as of every invariable rule, is unequal,—but then it is useful. It is one of those remedies in which it is better to put up with a little injustice, provided it is well known and understood and is free from the charge of favouritism, than it would be to strive in each particular instance after a more exact measure of justice, and in so doing to lead the way to mistake, misrepresentation and endless discussion. We are obliged to admit the immense difference, existing in the condition of ships, and, consequently, the pressure of the rule. In one case the vessel's general depreciation by age may be seventy-five per cent., and in another ten per cent., or five, or next to nothing. Yet, admitting all this, the convenience of a fixed proportion outweighs the occasional inconsistency of its particular application.

It is more difficult to answer satisfactorily an assertion often made by shipowners, that repairs do not improve a ship at all: that patchwork is not an advantage; and that they would have preferred their ship as she was before meeting with the damage on account of which she has been repaired. There really is no conclusive answer to this. We may rest a reply on the fact of its being a custom established by the underwriters during many years, and which enters into the estimate of the premiums charged. But we adopt the same rule for repairs forming General Average, with the several parties and with whom we have no such compact. And we depart from the rule in claims for cases of collision, where we demand payment *in full* for all the repairs. On shore, reductions on the score of melioration are not allowed or claimed. Supposing a gentleman's carriage to be run into by another vehicle, and to be then repaired at the expense of the person doing the mischief, the owner would certainly resist the deduction of a third from the cost of a new panel or from the fresh painting because one side of the carriage is newer and better than the other. The rule of melioration is an arbitrary one, and as such it must remain.

In delivering judgment in the cause of *Aitchison v. Lohre*,* Lord Blackburn discussed, *pro et contra*, the propriety of the deduction of thirds. There were ships so lately built and in such good condition, that a deduction of one-third from their repair after an accident was, taken in the single instance, excessive and inequitable. There were vessels so old and in such a state of decadence, that a deduction of two-thirds would hardly represent

* House of Lords, 4 App. Cas. 755.

the true proportion which underwriters should be left to bear. But on the whole, taking one case with another, the application of one-third from the repairs seems a not inequitable ratio to fix: and this deduction has the sanction of a long and extensive usance to support it. This view was taken for granted in the case of *Pitman v. Universal Insurance Co.**

It is to be remembered that this arrangement affects the two parties to the contract of insurance. Insurers and proprietors of cargo and freight are not directly concluded by it: but a similar practice obtains in adjusting a General Average, to which cargo and freight and the underwriters on these interests contribute to voluntary damage to ship's materials, and those parties tacitly consent to the same arrangement, which is, indeed, to their benefit; but which, whether so or not, they accept as a widely known and fair equation of varying conditions.

When a third is deducted in General Average where the ship is under one year old, or is insured on terms "thirds not to be deducted from repairs," or "no thirds to be deducted whilst the vessel is under a given age," or under the greater complexity of terms relating to repairs which exist in Steam-ship Insurance Associations, the thirds or other deduction thrown off in General Average are recoverable on the ship's policies which have contracted for a full payment of repairs. For these repairs are really a partial loss of the ship, and the ship's underwriters are directly liable for them. The recovery made in General Average, on the ground that some of the damage was voluntary, comes as a relief to the insurers on their full liability under their policy.

* Appeal, June, 1882, M'L. C. N. S. 577.

OF SOME REPAIRS WHICH ARE NOT CONSIDERED
PARTICULAR AVERAGE.

The underwriters have, in general, the onus of repairing and replacing damage caused by the force of the elements. But there are some parts and stores of a ship for which, conventionally, they hold themselves to be not liable, either because they are in a notoriously insecure position—although the customary one—or, because the loss of them comes under the denomination of “*wear and tear*.” Thus, the stern-boat, hanging in davits, is never allowed by them, nor are casks on deck, save a water or harness cask lashed, or secured by hoops, in its place; or warps and ropes coiled on deck, except, in the latter instance, if the vessel had just left port or was on the point of entering it, and so required to have the ropes made ready for use. These are excepted on account of the unsafe position in which they were kept. Wear and tear includes the splitting and carrying away of sails by the wind, the straining and breaking of running rigging during the ship’s navigation, injury to the pumps by pumping, and a few other items. The list of excepted articles from underwriters’ liability, especially when that list was longer, often gave great dissatisfaction to the insured shipowner, and raised frequent discussions between him and his insurers. And even now, when the irrecoverable items are fewer in number and less in importance, it is often hard to make him see at once the reason for their exclusion. He cannot at once comprehend the principle upon which the above-mentioned articles should be excluded by the insurers and thrown back on himself; remembering that

he has paid premium on them in common with the other parts of the ship, and that no written proviso was introduced in his policy to except them from protection. Indeed the list of articles included in wear and tear has latterly been reconsidered and reduced. It is not affirmed that all such should be admitted indiscriminately by the insurers, as a matter of course,—because it can be proved that these articles are frequently lost or destroyed by ordinary wear and tear, and sometimes in cases where due caution would have prevented their loss. The argument rather is that there scarcely seems sufficient ground for their being invariably disallowed by underwriters, or for their being uniformly classed as “wear and tear,” and left in the adjustment at the cost of the owner.

The rejection of these losses would appear to rest on one of two grounds;—either that underwriters never undertook the risk of the articles lost; or that custom relieves them from responsibility in the event of their loss.

Now as to the first plea:—A sail is as much an insurable part of a ship as are bulwarks, spars, copper, paint, &c. An owner makes no proviso with an underwriter that this portion of his vessel shall not be considered to be insured. If he did, he, the owner, would have the right to deduct its value from the general proceeds in a case of wreck and salvage. But he does not and cannot do so. The sails are of the most vital importance to the ship's safety and to the safety of the lives, the cargo and the freight which accompany the ship in her destiny. It is not every sail, however, which ought to be charged to underwriters; for, unfortunately, many ships are ill-found, and continue to keep in use sails, &c., beyond the

period when they are safe, and then the first breeze or plunge carries them away. On the other hand, it may be maintained that there are occasions when no strength of canvas or rope can withstand the enormous force of the elements. The underwriter replies that the purpose of sails is to use them; and if during the use of them the wind carries them away, it is a danger to which they are ordinarily and necessarily exposed; that it is "wear and tear," and the loss of them is the concern of the owner alone. Now there is something true in such an argument, and there is also something erroneous. The same reasoning might be applied to other materials and parts of a ship, and to the whole of the ship itself. It is the daily duty of the bulwarks to be exposed to the waves, to keep the sea off the deck:—yet when they are split or knocked away by those waves no objection is ever made to admitting them as part of an Average claim. So it is the ship's proper service to sail from port to port, and in so sailing to encounter winds and seas and dangers: but if using a thing in its proper service took it out of the indemnity granted by a policy, when it happens to be injured in that service, no claim at all could ever arise, and the whole system of marine insurance would come to an end.

The other ground of exclusion is that of custom. The underwriters will urge that the practice has long been submitted to; and that it is competent for persons insuring to introduce any special clauses into their policies, and underwriters would agree to them upon consideration of an additional premium. There appears, indeed, to be a misapprehension as to the power of custom or, as it is called, the usage of Lloyd's, to override the written con-

tract of insurance. Upon this subject, and specially referring to ships' boats, Sir J. Arnould makes the following important remarks:—"It will be observed, that the 'boat' is included by name as part of the ship in the common policies of insurance; hence in a policy on ship in the common form upon the 'body, tackle, apparel, munition, ordnance, *boat* and other furniture,' of the ship, Lord Lyndhurst would not admit evidence of a usage to show that underwriters never paid *for boats slung upon the quarters*, on the ground that, though '*usage may be admissible to explain what is doubtful, it is never admissible to contradict what is plain.*'

"In this case (*Blackett v. Royal Exchange Ass. Co.*) it should be observed that it had been proved on the part of the plaintiffs that such slinging of the boat on the quarters was usual and necessary in voyages of the description insured against: if the contrary were the case, and it could be shown that the boat was carried in any way which, while exposing it to extraordinary risk, was not proper and necessary on the voyage insured, it might fairly be considered that, as in the case of goods carried on deck, the underwriter would not be liable unless informed by the policy of the nature of the risk. Thus, in a case decided in the United States it seems to have been assumed that, if it could be clearly shown that carrying boats slung at *the stern davits* besides being a *dangerous* was also an *unusual* mode of carrying them on the voyage insured, the underwriter under the common form of policy could not be liable for their loss." *

We must look for a reconciliation of the arguments in the nature of the thing itself, and from the congruity of

* Arnould, p. 20. 3rd Edition.

the whole system, looking to the object of insurance in its fulness and completeness. The end and purpose of insurance is to indemnify him who insures against losses incurred by perils of the seas;—and it would be well that losses which can be shown to have arisen from those perils should be met in a liberal manner by underwriters; who, on their part, should receive such an adequate premium as would enable them to afford a complete insurance, and fully to indemnify the assured for his losses. There are indeed nice shades of difference constantly arising in practice,—differences in degree as well as in kind, and which require the judgment of a disinterested person to decide them. Thus the Average Adjuster's office is really more judicial than some imagine, and not one merely of routine. Precedents and rules indeed exist in plenty; but they are not always apposite, and in consequence of an inexhaustible variety of circumstances, they cannot always be pleaded for or against the admission of particular charges in a statement. “The law of cases of necessity is not likely to be well furnished with precise rules: necessity creates the law, it supersedes rules; and whatever is *reasonable* and *just* in such cases, is likewise legal.”

Metal Sheathing, &c.

By one of those tacit rules, which are called the Custom of Lloyd's, underwriters did not formerly pay for the stripping and resheathing of the bottom unless the vessel had touched the ground or been in contact with some body below the water's edge. Metal sheathing is a material exposed to progressive loss by mere contact with water, and with more rapid waste when the

ship is passing quickly through the sea, because by oxidation the surface of the metal is constantly corroded, and is rubbed off by the friction of the water through which the vessel is propelled. Sir Humphry Davy and others have turned their attention to this subject, and have endeavoured to devise means to reduce or prevent the wasting of metal sheathing. The great chemist just named tried a method of protection by which a galvanic action was set up, that exerted itself in rings round the protectors, and really had the effect supposed and intended ; the wastage was greatly reduced, almost entirely suspended ; but another result was occasioned, and which proved more disadvantageous even than the gradual loss of the copper ;—the surface of the metal being more nearly permanent, all the protected circles became covered with weed, barnacles, and other growths of vegetable and animal life, and the object of the experiments was defeated by its too great success—the saving of metal took the place of a *clean bottom*. The course of the ship was impeded by the substances which adhered to it ; and after several trials of modified means, the experiments were given up. The waste of copper goes on in a ratio not quite uniform, but which may be roughly estimated at twenty-five per cent. in each year of the quantity of metal remaining. Thus at the end of the fourth year it is generally necessary to remetal the bottom, although the vessel have not met with any accident ; the quantity remaining on her will have been reduced to about a quarter or a third of the original weight, and that, probably, wrinkled and broken by the working of the ship when carrying a cargo at sea. The Yellow Metal, an alloy of copper originally patented by Mr. Muntz, is

less soluble, but it is more brittle. It lasts rather longer, weight for weight, than copper, which it has almost displaced. Zinc, too, is used as a cheaper substitute.

Most ships occasionally strain. It cannot be imagined that the strongest vessel when loaded with hundreds of tons of cargo, and exposed to average weather, now smooth now rough, can altogether escape some degree of strain in her seams and frame. The result is a gradual wrinkling of the metal, and working out the caulking from the seams.

But underwriters held that shipowners have no claim on them in regard to repairs of the parts under water unless a definite and acknowledged cause of damage can be shown; that cause means the striking of the vessel on the ground, or a wreck, or the collision of the vessel with another so that she receives a blow below water; proofs of which are very obvious to the eye of a practised surveyor. There are two or three other infrequent cases in which they admitted they may be liable to replace the metal sheathing. Even before the leading case of *Harrison v. The Universal Insurance Company** was tried, some persons entertained doubts whether the exclusion of repairs to bottom was on many occasions justifiable. It is true that by acting on a general principle of not paying for repairs to the bottom, except as stated, the door is shut to a great deal of fraud and misrepresentation, because unprincipled men are ready enough to take advantage of the underwriters, and endeavour to make the expense of keeping their vessels in ordinary repair fall on the insurers; but a real necessity may arise for

* L. R. 7 Ex. 39.

stripping and re-metalling a ship's bottom although the vessel have received no blow below water. A blow above water may be so violent as to extend downwards and strain the vessel far beneath, if not throughout. A heavily laden ship under canvas, hove down by the force of the wind and sea and kept on her beam ends by water filling the sails, is, until relieved, in an unnatural position,—one that must try her fabric and cause an excessive strain. There are many supposable occasions which should establish a legitimate claim on the underwriters for damage in this respect.

The general question, however, of the underwriters' liability for resheathing and repairing a ship's bottom under the circumstances we are considering is no longer left in doubt. The cause of *Harrison v. Universal Insurance Company*,* though a *Nisi Prius* case, settled the point. The ship *Kensington* during violent weather sprang a leak; and in order to render her tight and seaworthy it was necessary to strip her metal sheathing, repair some butts, &c., caulk and re-metal her. The underwriters, resisting that part of the claim for particular Average which related to the repair of the bottom, alleged that a general custom existed which exonerated them from repairs below water unless the ship had struck the ground or some substance other than water. The jury found that a universal custom to that effect had not been proved, and that underwriters were consequently liable for such repairs. Supposing the custom had been held proved, the legal question would have remained whether the unwritten code of custom would be allowed in the particular instance to control the general contract

* L. R. 7 Ex. 39.

by which an underwriter engages to assure the shipowner against all perils of the sea, &c.; but the case did not proceed beyond *Nisi Prius*.

The underwriters, alarmed at the result of the *Kensington's* trial, framed clauses to protect themselves for the future against its action, and they added them to the ordinary language of the policy. Such are "not liable for re-metalling unless the ship be stranded;" or "free from all damage to the bottom below water, except the vessel strike the ground or be in contact with some substance other than water," and the like; while some persons made the condition still more definite by using the expression "unless *caused* or *occasioned* by the ship being in contact, &c." These clauses continue to be very commonly inserted in ships' policies.*

It should be observed in this case, which has proved of so much practical importance, that the damages to the bottom of the *Kensington* were declared, and were admitted, to have been occasioned by a sea peril. The meaning of the verdict must not be stretched beyond its intention, as if every leak or defect in a ship's lower works were necessarily claimable from the underwriters. Wear and tear is excluded as before. To allow a claim even on this precedent, a reasonable cause for the damage and the repairs claimed must be shown; and that cause must be from perils of the sea, and not from mere age, defect, infirmity, or overloading.

* Is ice a substance other than water? Physically and scientifically, it is water, in a changed condition. Practically it is a new and different substance, as dangerous, as capable of doing injury to a ship as a rock or a wreck. When the question comes before a Court of law for decision, it will be found "very arguable," and, in clever hands, very interesting.

In questions, therefore, of the underwriters' liability governed by the *Kensington*, the merits of each separate case must be examined: and whether resheathing and other repairs below water should be allowed, must be very much left to the decision of the Average Adjustor assisted by marine surveyors.

Masts, &c.

Masts carried away or sprung during a gale are Particular Average; so are, by consequence, other spars, yards, booms, bowsprits, &c. Even if they are pitched or rolled away in a cross sea, they are now generally allowed, although there is not so decided cause for their loss as a positive storm. Spars which are merely rolled away in ordinary weather do not generally come within a claim: and discrimination must be used to decide how far an unusual force, amounting to what is called an accident, bears out their loss. Studding sail booms, and any small spars which are properly kept on deck for sudden use, are chargeable to underwriters when they are washed off deck.

Sails.

Sails are not allowable as Particular Average when they are blown away or split by the wind. If a sail goes with a yard or mast, or is split when the spar goes, or is blown out of the gaskets when stowed, it is claimable. So also, it would appear, when a sail is being furled, and the wind gets into the belly and bursts it. So are, also, sails split or burst by a sea breaking into them, or by the spars of another vessel when in contact. Sails

are often lost from carelessness or mismanagement, and are not unfrequently cut away to save trouble, or because the vessel is short-handed. Sails in general are things so much exposed to wear and tear and ordinary accidents that there is much reason why they should be sparingly allowed. Studding sails washed off deck are claimable. It has always been difficult to make owners acquiesce in the non-allowance of sails blown away during a hurricane, or in keeping the vessel off a lee shore.

Anchors and Chains.

In collisions it sometimes happens that the anchor hanging over the bow is broken or hooked by the other vessel, and the chain must be cut, if it be not broken by the accident. A vessel lying at anchor may have her chain broken by another ship driving into her hawse, or by pressure when lying in a tier. In these cases the loss is claimable as Particular Average.

Chains which parted whilst a vessel was at anchor, however heavy the weather might be, were formerly excluded from Average, as a matter of course, on the ground that the parting of cables was "wear and tear." Many clubs, however, by a special clause accepted the risk of the breaking of chains and anchors: and at the present day it can no longer be maintained even on policies in the ordinary form, that the parting of a ship's moorings in violent weather is "wear and tear," and, consequently, a loss falling on the owner and not on his underwriters. The matter was put to the test several years ago, by an action brought to recover from

underwriters the value of an anchor and chain, the former of which parted in heavy weather. The case was not argued in court, for the defendants, on the advice of their counsel, paid the claim at the last minute. The circumstances give this case the weight of a legal decision ; and the prevalent doctrine at present may be stated to be, that anchors and chains which have been authoritatively tested, breaking or parting in heavy weather, are claimable from the insurers as Particular Average, if their cost of replacement equals three per cent. of the ship's value in the policy, or in connection with other damages falling on underwriters. The testing proviso is important ; and it implies that not every chain which parts, or anchor which breaks, necessarily constitutes a claim on policy. Weak and imperfect chains part even when there is no extraordinary strain upon them, and their loss will continue to be assigned to "wear and tear."

It may be added that under the stringent regulations of the Merchant Shipping Acts, the generality of chains and anchors in English vessels have been tested.

Boats.

Boats on deck or within board are allowable, but, as has been mentioned, the stern boat in davits is excluded by custom. A boat lost or damaged in the water may be claimable as Particular Average although employed in its ordinary duty : but a boat is not to be allowed when lost by being carelessly kept towing astern or otherwise left in a place of unsafety when it ought to have been taken on deck. Boats used for loading ships in the West Indies are often insured by a policy apart

from the general policy on ship. There may be a claim for General Average for boats doing *extraordinary* service, as in getting a vessel off rocks where she is stranded, &c.

Stores and Provisions.

A harness cask properly secured on deck ; hen-coops ; cow in house on deck ; stock of vegetables in the boats ; cooks' stores and utensils in the round-house,—are allowable when lost. So also are stores and bread in the lockers and cabin, when destroyed by the sea breaking on board and forcing its way below. The perishable provisions and groceries are to be replaced without deduction of a third, as they are not supposed to have been deteriorated by keeping. Water-casks on deck, unsecured, are classed as wear and tear when they are lost, and are disallowed. One water-cask and one harness-cask for present use, secured by lashings or metal bands, are properly allowed.

Ornamental Work.

Painting will necessarily be required with new work in the topsides, masts, &c., when their replacement is allowed. The carved figure-head ; the carving and gilding about the stem and the stern ; the ship's name, &c., must be charged to the underwriters. But an extravagant amount of ornamental work is not permissible ; for although the quantity stated to have been destroyed may have been so really, yet owners are not wantonly to expose an expensive object in a part where it is so liable to destruction and injury. It stands in the same category

as the stern boat. They can place it there if they choose to take the risk of it themselves, and they can carve and gild in gratification of their own taste for extreme ornamentation, but underwriters must be excused making it good beyond a certain quantity. This limitation is upon the same equitable grounds which prevent a London tradesman recovering more than a certain sum for very valuable plate glass windows to his shop front when they happen to get broken. He may make a reasonable display, but he is not to expose passers-by to the danger of breaking windows of extreme cost :—and windows are necessarily in situations involving at all times some risk to their safety. The internal palatial fittings of some of the magnificent passenger steamers do not come within the foregoing remarks. They are not exposed like external ornament to the action of the elements.

EXPENSES TO A PORT OF REPAIR.

There is an occasional item of expense connected with Particular Average, which should here be mentioned. A ship having put into a foreign port with damage may there get rid of her cargo, either by its being at its destination, or by agreement with the merchants, and, consequently, the joint adventure is at an end. Then, as regards the repairs which have become necessary, it may be found that it is impracticable to effect them at that port; or, that they may be done, but at an exorbitant expense. The master is, under these circumstances, sometimes very well advised by the surveyors or agents to get some temporary repairs effected and proceed home, or perhaps to return as a light ship, without incurring

the cost of even temporary repairs. How are the crew's wages to be dealt with? It is admitted that great jealousy is allowable when seamen's wages are introduced as a charge to underwriters. An owner is bound to keep his ship manned whilst on a voyage. But here the voyage is ended; there may be no reason for sailing back to the hailing port, save to get the repairs effected; and either it is absolutely necessary or greatly desirable on the score of economy, that this course should be taken. This is one of those positions that must be judged of by their merits. It should be left to the discretion of a competent person to say whether the wages do not become a real incident of the damages, and, as such, whether they are not sufficiently removed from ordinary owners' expense to make them claimable from the underwriters on the score of invincible necessity or of economy. On prudential grounds persons do not object to pay an expense which procures a greater saving to them. Wages, provisions, and other charges bringing a vessel to an economical place for repair should, however, be made to follow the outlay. As the owner saves on his one third, one third of the wages, &c., should fall on him, or a still larger portion, if other work not claimable of underwriters has to be effected—for on that part also the costs of transport procure a proportional reduction to him of the costs of repair. Steam-tug hire to convey a ship to a repairing port is subject to the same considerations.

Fire.

When fire breaks out in a ship it most generally ends in her destruction; the great bulk of a wooden vessel being composed of combustible, and certain parts of very inflammable, materials. When only partial in its damage the injury from burning is Particular Average and subject to the same rules as the preceding. The causes of fire are usually the spontaneous combustion of cargo, lightning, errors of construction in steamers allowing an accidental overheating of the machinery to ignite the neighbouring woodwork, ignition of coals in the bunkers, carelessness and accidents with lights and stoves. But fire being both in ships and in houses insidious in its first steps, it frequently happens that the true cause of the conflagration is never discovered. Of the means taken to extinguish fire the commonest are the pouring water into the hold, and the scuttling of the ship to sink her, if she be in port or in shallow water.

It was formerly held that the pouring down of water into the hold did not constitute General Average: that whatever damage the cargo might thereby sustain must be borne by the goods themselves; and, in like manner, that the ship must bear injuries done to it by cutting decks, or the spoiling of furniture, stores, provisions, charts, books, instruments, &c. Most India and China policies contain an exception, by a memorandum, to all loss arising from carrying gunpowder as cargo. The ignition of powder comes under the class of fire. The case of *Stewart v. West India & Pacific Steam Co.** put

* L. R. 8 Q. B. 88. See also *Achard v. Ring*, 31 L. T. Rep. N. S. 647; and *Whitecross Wire Co. v. Savill*, M. L. C. N. S. 531.

these views aside, and authoritatively decided that damage done to ship or cargo, by immersion, or by pouring down water below is of the nature of General Average, and is recoverable, *ad valorem*, from all parties interested in the joint adventure. This is now quite acquiesced in. What has to be shown is that the parts of the vessel or of the cargo for which a claim is to be made in General Average had not been previously injured by fire.

A considerable change has also taken place during the last few years in respect of articles of ship and cargo burnt to keep up the furnace fires of steamers when their fuel is deficient from supervening causes. A steamer is bound to carry what is cautiously estimated as a sufficiency of coals or fuel for her intended voyage; and if she is at all deficient on the voyage she is under the obligation of taking in more fuel at any coaling port coming in her route. She is, indeed, to take an *abundant* quantity; much more than the average requirement of a favourable summer voyage. The contingencies of bad weather and contrary winds are to be provided against. Some foreign nations give the proportion of fuel as half as much again as is a steamer's ordinary consumption on a given voyage; in another country it is said the quantity taken should be double the vessel's ordinary wants. Without some such superabundance, a claim cannot be made out, either in General or Particular Average, for ship's materials, or combustible cargo used as a succedaneum for her proper fuel. And when either of these articles is so burnt, credit should be given in the Average-Adjustment for the cost of an equivalent quantity of coals; such equivalent having been unexpended by the

burning of other substances. A clause giving effect to this arrangement has been introduced into many of the mutual club rules enforcing what may be deemed an extreme regulation, viz., that for necessitated "burning of cargo or stores, a deduction shall be made of twice the cost of coals estimated to have been saved. The price of coals shall be the price at the ship's last port of departure." This rule, of course, involves a penalty, intended to prevent a parsimonious expenditure in providing fuel.

The more rare case of burning stores, materials or cargo for fuel when a ship is beset in the ice, and detained there is scarcely provided for. It is an item that must be judged on its merits; on the rights of humanity, and also of policy in saving the lives and strength of crew, in whose safety the safety of the whole adventure also depends.

Men-of-War, Enemies, Pirates, Rovers, Thieves, Letters of Mart and Counter-mart, Surprisals, Takings at Sea, &c.

This ample enumeration of risks of a similar kind arising from acknowledged enemies, from licensed depredators, and from predatory rovers, marks a state of things existing when the policy was constructed. We have ourselves been happily exempt for so many years from direct hostilities, except when taking part in the short Crimean war, that the titles "men-of-war" and "enemies," so far as the latter mean national enemies, do not strike the ear as risks of great importance. "Pirates, rovers," &c., are also contingent dangers, from which the Western waters are pretty free. We now and then, but only

rarely, hear of a vessel attacked by pirates* in the Levant ; the chief scenes of danger from this cause are the Indian Ocean—from Dyacks and Malays ; and along the coasts of China and Cochin China. Commerce, before the ocean was swept of these public and private pests, was very different from itself in our day : it was fuller of risk and adventure. Indeed, those commercial enterprises which we call *undertakings* were named in former years *adventures*, and the traders themselves were named *adventurers*. Thus the marine policy itself is expressed, —“Touching the adventures and perils which we the assurers are contented to bear,” &c. With regard to letters of mart and counter-mart the wiser spirit of the present age, though it has not power altogether to do without the barbarous and irrational remedy of war, manifests itself in its desire and intention to mitigate the horrors of the system. Whether in future wars—*absit omen* !—the confessedly important weapon of licensed privateers will be laid aside remains to be seen. Abundant arguments from reason and humanity have lately been put forth against the allowance of private warfare ; but we do not yet see any certain sign of its universal discontinuance. Let us hope that the names of Letters of Marque, &c., may more and more be recognized as things belonging only to the past, and for all practical purposes expunged from the modern vocabulary.

As the injuries inflicted by enemies are usually total in their result, this class of dangers will be more properly

* The late Mr. Justice Maule, however, made the remark that the word pirate is not restricted to mean *melodramatic pirates*. There may be pirates in common clothes. It may be added that when a crew feloniously runs away with the ship they navigate, both barratry and capture apply to the loss.

considered in that part of the subject which relates to total losses. It will be sufficient to say here, that any partial damage done to the ship's hull, sails, and rigging is claimable as Particular Average in the same way as other injuries received at sea; and that the expenditure of powder, shot, &c., seems expressly provided for by the words "ordnance, munition, artillery," &c., specified in the preceding part of the policy.

Arrests, Restraints, and Detainments.—Barratry.

So, too, the consideration of these two heads will be deferred, because they eventuate usually in the complete loss of the ship to her owner, and the questions which arise in respect of them need not detain us here. If, however, arresting and detaining parties retire from the vessel after having committed some damage to her materials or stores, such damage forms a claim on the policy as Particular Average; and the circumstance of its arising from the voluntary acts of man does not set up a material difference to the damage sustained by purely natural causes.

All other Perils, Losses, and Misfortunes to the Hurt, Detriment, or Damage of the Ship, &c.

This final undertaking of liability by the underwriters may seem so wide as to include every possible loss, damage, and contingency which can happen to a ship. And it may seem to exclude any defence which underwriters might make to an action for loss or damage brought against them. The definition of the insurers' liability is, indeed, exceedingly comprehensive; but we

must look to the usual and consistent interpretation which has been made of the terms by courts of law and by writers on the subject of Insurance ; and also, which is of great importance, to that general impression which prevails in the minds of insurers themselves when they sign a policy ; because *intention*, though not on every occasion openly expressed, is to be looked to in construing contracts which are for the most part couched in the unvarying terms of a printed form.

It may, then be unhesitatingly asserted that underwriters by their policy have no intention of granting such a plenary indemnity as it would amount to if they undertook to restore every ship at the end of the voyage insured to the same condition in every respect in which she was when she sailed. In that case they would virtually have to repair the ordinary ravages of time, and restore the vessel to a perpetual youth. They would have to cure the inherent defects (*vices propres*) which might have existed in the ship and which from some cause exhibited themselves during the currency of the policy. But they do not mean to undertake this.* *The foundation of claims on underwriters is ACCIDENT.* The damage which the vessel sustains must be something extra to the ordinary events, to the ordinary waste and decay which all shipping is subject to. If a ship lies in a tropical sun, the seams will shrink and her paint will blister ; if she lingers about the mouth of certain rivers worms will attack every exposed piece of wood within their reach. It may be mentioned, however, that a leak

* The Mutual Steamship Insurance Association do generally, now, admit their liability for unknown flaws in shafts and propellers, when no fraud or concealment of facts is suspected.

caused by worms attacking a ship was held to be one of the "perils of the sea" within the exceptions in a bill of lading, the vessel having been seaworthy when she sailed.* But it has been commonly maintained that damage by worms is only chargeable to underwriters when the timbers, &c., previously covered with metal have been denuded by accident. If a ship's boat be allowed to remain floating by her side when the occasion for its use has ceased, it may be stolen or swamped; if a vessel go on winter voyages, she will necessarily expose herself to winds and waves which will strain her, rend her sails and wear her rigging. At all times and places a slow process of destruction is going on which will at last, as a matter of certainty, cause her death. A ship is a terminable property; and this fact enters into the consideration of a price given for her, and of the rate of freight demanded for her hire. Underwriters do not intend to take upon themselves the repair of that ordinary and gradual decay which is *incidental* to a ship's condition, but only of those unusual and non-necessary deteriorations which are *accidental* to it. So that if even a vessel be in a certain trade, in which it is known that all ships that are hardy enough to enter upon it are exposed to risks, as a matter of common occurrence, risks which do not commonly appertain to other voyages and trades, the injuries they sustain do not necessarily form claims on the insurances; because, in that particular trade, the injuries are expected and frequent, and a certain number of them are calculated upon and are compensated by the increased freight paid in that trade. Thus, at St.

* *Heydorn v. Bibby, Exchequer, March, 1855.*

Michael's, it is nearly an every-day occurrence for the ships lying there to have to slip their chains and proceed to sea : when the weather again becomes favourable, they return and pick up the anchors left there. It will presently be shown that in certain ports and rivers it is common for vessels to ground with the ebb tides, or on certain known bars of sand, and yet these same groundings do not necessarily constitute a *stranding* within the meaning of the policy, although a much shorter detention on the ground in some other place would have all the character of a stranding. These distinctions are not caprices or inconsistencies ; they proceed from a great ruling principle, which ought always to be kept in mind, viz.,—*that underwriters are responsible for the extraordinary, and not the ordinary events of a voyage.* What has been said will give a meaning to the expressions *perils, losses, and misfortunes*, used in the policy. At the same time I may repeat that the terms are very large and general : that they do hold out a prospect of a liberal compensation to the owner who is insured ; and that the assured who has met with damage ought not to be put off with technical quibbles, or set aside upon some verbal informality. He pays his premium in good faith, expecting an equal measure of good faith on the part of his underwriters. And the latter persons are supposed to know their business, and to demand for each separate risk a premium which, taking all the circumstances into consideration, is calculated to remunerate them for the hazard they run. And there are conditional extra rates, such as Baltic premium, which in some measure are the equivalent for ice risk, &c.

OF STRANDING.

Passing downwards from the body of the policy to the note at its foot called the Warranty or Memorandum, we come to a very important stipulation with respect to claims, and one which has been the occasion of almost innumerable questions and suits. It is so necessary to entertain a clear understanding on this part of the contract that we shall enter at some length into its examination. The clause, as far as it concerns the vessel, runs thus:—"The ship . . . warranted free from Average under three pounds per cent., unless General or the ship is stranded."

Intention of the Clause.

The intention of this warranty is pretty obvious. It is to protect the underwriters against trifling and frivolous claims. Were it not introduced into the policy the most vexatious demands might be made upon the insurers. Not a ship that came into port at the completion of her voyage but might find some petty repair to effect at the underwriters' cost. The latter would need the eyes of Argus to defend themselves from imposition; and no vigilance would suffice if claims were to be allowed, however insignificant they were in extent. In order therefore to avoid constant petty demands upon underwriters for equivocal damage, and to confine their liability to *bonâ fide* claims, a line was drawn and an arbitrary proportion was established, the tendency of which is to repel claims and attempts at claims, by relieving underwriters from them if the repairs of damage fall below the limit of the three per cent. on the declared value of the

ship in the policy. This restriction was not intended, however, to apply to General Average Contribution, for that is not open to the same objection; a claim on this account is more likely to be genuine; and by not limiting the proportion to a definite ratio, no inducement is held out to any party concerned to run up expenses where they can be avoided. In Mutual Insurance Clubs the excluding limit is generally one per cent. In some it is agreed at two shillings per ton.

Why an Exception made in favour of Stranding.

But an exceptional proviso is made in the warranty, viz., in favour of a ship that is stranded. In this case no inquiry need be made into the proportion which the repairs bear to the value of the ship. No doubt, when first the term "stranded" was used it had a much stronger and more defined meaning than is now assigned to it by law and by custom. It scarcely admits of a question that when the word was originally employed in the policy it was meant to indicate a cause of damage so great and notorious as to set aside all doubts about the propriety of a claim on the insurers. By *stranding* was intended the casting of a ship on shore, or the lying of a ship on rocks in such a manner as that great and immediate injury would accrue to her, if not total destruction. But afterwards it was found that there were many sorts of lying on the ground which might be entitled to be called strandings, and yet might not inflict any great or special injury on the ship or goods. When a great number of cases more or less approximating in circumstance came to be compared, this practical difficulty was discovered, that often there might be a stranding in form, and yet

the ship and goods might not receive much damage ; and again, there might be great injuries done to a vessel and her cargo by striking with her bottom on rocks or some other substance, and yet not in such a way as to comply with the idea and definition of a stranding. Were the former, the slight damages, to be admitted in virtue of an almost nominal stranding ? Were the latter, the real injuries, to be excluded, because some circumstances were wanting to bring them within the conventional meaning of the term ? And then as maritime commerce, and especially the coasting trade, continually increased, a host of difficult cases arose, and refined definitions were resorted to to show that they came within the favoured term of *stranded*, or that they should be excluded from the benefit of that privileged expression. It may be considered that the principle is now firmly established, that if the formal conditions be fulfilled the extent of the results need not be looked to :—that if it can only be shown that a ship is stranded within the definitions as successively laid down in our courts of law, it matters not that, effectively, little real damage was consequent upon the stranding, the damage is claimable on the policy :—and conversely, that however great the damage, and however clearly it may be traced to a concussion received by the bottom of the ship on rocks or ground, yet if it does not exactly meet the prescribed conditions of a stranding it is not claimable on that score. So that whilst a claim may be established for a slight injury to a ship by her getting across a brick sewer in the river, as being a stranding, another claim for injuries of a severe kind must be rejected, though it can be shown to have been occasioned by the vessel striking during an hour or longer

on pointed rocks, provided that all the time she were water-borne and not absolutely at rest upon the bottom. Of course, if the Warranty ran "unless occasioned by stranding" the inconsistencies would almost vanish; but it is very difficult to depart from old custom.

The Effect of a Stranding is to destroy the Warranty.

It is of great importance to observe that the effect of a stranding when established is to destroy the Warranty. This is doing far more than merely admitting the particular damage occasioned by the stranding itself; for it lets in all former damages on that particular voyage, though they happen quite independently of the stranding. It, in fact, expunges the limitation of the claims to a given ratio. It wipes out, as it were, the "Memorandum."* This is of great consequence in claims on goods, and will be considered when that part of the subject is treated of, and need not be farther entered upon here.

The Conditions necessary to a Stranding.

It is not every resting on the ground that constitutes a strand: neither is it every violent striking on ground, though productive of much mischief, that establishes it.

* Thus the Warranty is very similar to a *condition* in law: one infraction of which destroys it for ever, without power of revival. The legal *condition* has been ingeniously compared to the little scientific toy, the Rupert's Drop. Break off the smallest fragment of the glass thread in which the drop terminates, and all cohesion is gone,—it flies into ten thousand atoms in the hand. The same figure would equally apply to the warranty, the infraction of which, has, moreover, a retrospective effect.

Judges have defined and redefined, have identified what is common, and nicely distinguished differences. The more the decisions that were given the more intricate the subject became; and uncertainty seemed to prevail in proportion to the number of the rulings of courts and the verdicts of juries. The primitive idea of a stranding has long since been abandoned; and having wandered from it so far as to render return next to impossible, the only course which remains is to collect cases for and against stranding, and to gather into one the conditions which are at present held to be essential to its nature.

They are the following :—

First; the course of a ship must be stopped for a *definite portion of time*.

Secondly; the ship must be stopped or her situation altered by some *accidental* occurrence; the grounding or stoppage must be unusual.

Thirdly; she must be *out of her course*; or she must be in a situation she ought not to be in by the ordinary circumstances of the voyage, &c.

Fourthly; when stopped she must *not be at all water-borne*, she must be actually at rest on the bottom, whatever it may be, or on some object itself fixed on the bottom.

These appear to be the important features of an established strand. They do not seem to convey the same impression which we receive *a priori* from the term stranding. That word originally meant to express “great damage received by a ship in consequence of striking or lying on a shore, rocks, and the like.” The definitions given above imply something weaker than this. We hear

little or nothing of violence. We seem to look to a compliance with certain forms only.

First. The course of the ship must be stopped a definite portion of time. But it is not of consequence that it should be a long time, so that it be definite,—absolutely a stoppage *pro tempore*. A quarter of an hour is sufficient, nay a minute will suffice, if it can be shown that the progress of the ship was stayed by some obstacle on which she rested.* Neither is it of consequence on what particular substance she rests. It may be rocks, or stones, or sands, the shore of a sea or the bank of a river: it may be mud, or a sunken wreck (if it be stationary, fixed to the ground), or a pile, or, as I mentioned before, the brick arch of a sewer projecting into a river. Formerly it was thought that it was necessary, to prove a stranding, that anchors and chains should have been carried out to heave the vessel off with. This may be a good corroborating circumstance, but it is not an essential one.

Secondly. Accident is so essential to the nature of a stranding, that it may be said to be its univocal sign. Where vessels rest on the bottom in a usual way, strain, make water, &c., this is not stranding within the meaning of the policy. There are many tidal harbours where at particular periods of the tide all the vessels ground. There are rivers, like the Hooghly, so studded with sand-banks that in ordinary navigation the vessels commonly stop on them, and their remaining on them for a while is so common an occurrence that it has nothing accidental in

* Lord Ellenborough's ruling in *McDougle v. Royal Exchange Ass. Co.*, (Arnould, 3rd Edit., p. 753), seems opposed to this: but the case is old, and we must not rest on a single instance. In difficult subjects cases require to be *roped together*, like Alpine climbers, so that when one falls, or is contradictory, they have the support of the rest.

its character. There are other rivers, like the Danube, that have sand-bars across their mouths, where it is certain that all ships of a given draught of water will ground, and that vessels of a less draught *may* ground at periodical or uncertain times when there is less water in the river than usual. At the Sulina mouth of the Danube the majority of vessels discharge part of their cargoes into lighters, to reduce their draught sufficiently to enable them to pass the bar.* Such groundings as the above-named are not strandings, because accident is not an element in them. But let accident interpose, and a stranding may take place in the very same spots. In going up a river a sudden flaw of wind or a blow received from another vessel may make a ship lose her headway, and she may ground on the river's side and be stranded. A ship may be in a river harbour, lying on the ground in safety, but a fresh of water coming down, or the action of a storm, causing the sand under her bottom to scour away and leaving her unsupported in part of her length, may strain and injure the vessel, and she will be held to be stranded.

In the trial of *Thompson v. Whitmore*,† a vessel under charge of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the bock basin by a rope to the shore; she was left there, and took the ground. When the tide left her she

* Groundings in the Suez Canal, and in some of the deltas in the Black Sea, and two rivers in Guiana are so common, that these places are usually excluded by name in policies. It requires, however, to be noticed that a distinction is being admitted by some underwriters between ordinary and casual groundings in the Canal, and those more serious accidents of this nature, there, which would elsewhere be held to be *strandings*, and entitle the assured to a relief from the warranty.

† 3 Taunt. 227.

fell over. This was held to be a stranding. Here was an accidental interposition, which is essential; but, it was remarked, it is not essential to constitute a stranding that it be the consequence of a storm.

So, again, in *Rayner v. Goodmond*,* a vessel arrived at a place called Beal Lock; and while there, it became necessary to draw off the water. The master placed her in the most secure place he could find, alongside four other vessels. On the water being drawn off, all of them grounded; but this ship grounded on some piles which were not known to be there, the part of the navigation where she took the ground being the usual one where vessels were placed when the water was drawn off. It was held to be a stranding.

So, in another case, *Bishop v. Pentland*,† a vessel in the ordinary course of her voyage was compelled to put into a tide-harbour, and it became necessary, in addition to her usual moorings, to fasten her by tackles to the shore, to prevent her falling over. The rope not having sufficient strength, broke when the tide left the vessel, and she fell over. This was also held to be a stranding.

The same was ruled by Lord Tenterden where a ship arrived in Hull harbour and proceeded to discharge her cargo at a quay. As this could be done at high water only it could not be completed in one tide. At the first low tide the vessel grounded on the mud. On a subsequent ebb, the rope by which her head was moored to the opposite side of the harbour stretched, and the wind blowing from the east at the time, she did not ground entirely in the mud, but her fore-part got on a bank of stones, rubbish and sand, near the quay, and the vessel strained.

* 5 B. & A. 225.

† 7 B. & C. 219.

The cases cited will show the animus of decisions relating to stranding, as involving the underwriter's liability. In all these instances it was clear that damage occurred to the property insured, and that the damage was closely connected with the circumstances detailed in each. In many cases where stranding affects claims on goods, and also sometimes on ships, it is very doubtful how much of the damage, or whether any of it at all, was occasioned by the grounding which it is desired by the assured to prove to be a stranding.* Here, however, it is different. Here there is no doubt that the assured's property was endangered, and the technical question is only whether the circumstances through which the damage accrued came under the definition of strandings. It will hereafter be shown, that such questions are much more important when goods are concerned than where the ship alone is affected; because with regard to the former we shall see that many descriptions of merchandise are free from Particular Average *unless stranded*, but ships are rarely so warranted; and that other descriptions of goods are declared free from Average unless the damage amount to a given proportion of their value, as ten or five per cent.; whilst a ship is only limited to exceed three per cent.; upon which latter limitation or franchise a particular argument will arise.

Thirdly. A ship must be out of her course, or she must be in a situation she ought not to be in by the ordinary course of the voyage. This postulate may be

* The value of a survey on the ship's bottom should here be mentioned; not as a test of the sufficiency of damage to produce a claim on insurers; but, incidentally, to throw light on the validity or violence of the stranding.

almost considered to be involved in the two signs of stranding already given. But I prefer to retain it separately because of a very decided, and, I think, memorable and important sentence spoken by a judge (Littledale) upon this particular feature. He said, "I think it is immaterial whether a vessel takes the ground when she is in the course of, or at the end of the voyage. But when the vessel is on the ground, or stranded, in such a situation as she ought not to be in while prosecuting the voyage on which she is bound, that is stranding within the meaning of the policy." And this gives a clue to decide some very difficult questions of stranding; cases in which the circumstances very closely resemble one another, but have this point for a difference. Thus, a vessel proceeding towards or from a harbour up an estuary or a river in which are many shoals of sand, like some of the ports on our own coast, may ground once or several times in the course of her journey, and yet, as has been before stated, not be *stranded*, because such groundings are incidental to that particular navigation. But if by reason of some previous accident the vessel be unmanageable; or being well under command, if she lose her way in a fog; be set out of her course by a current; or be driven out of her proper and usual channel by a storm or a squall,—a grounding then under such circumstances would be a stranding, even though no more damage was received by the ship than what happened when she grounded in the manner previously described. And so in the case already alluded to, of a ship which by some accident got across the brick arch of the common-sewer running into the river Thames near the entrance of the London Dock, and on which she broke her back;

this was a true stranding : because all these cases can be proved by the test of Judge Littledale, that the vessels were in such a situation as they ought not to be whilst prosecuting their respective voyages.

Thus, too, in an action where a vessel in distress put into a harbour of refuge and, it being low water at the time, grounded on the mud, it was held to be a stranding ; the ship's course having been departed from through necessity. Had she entered at high-water and the tide had afterwards gone down, leaving her on the mud, that would not have been a stranding.*

And this indifferency as to what part of a voyage the ship is on when she meets with the accidents was well shown in a case that came under our notice, where a ship waiting in a French harbour to receive her cargo was ordered by the authorities to remove from where she was moored and go across the harbour and lie on the mud on the other side,—a usual place for ships to lie whilst waiting. She went, was placed on the mud, and as she gradually settled down in it, a pile or post that was not visible entered her bottom, and so transfixed her as to require her to be lifted upwards to withdraw her from the post which had pinned her there. And if a ship at the end of her voyage on entering her harbour and coming to her berth settles upon a large stone which enters her bottom, there is a strong presumption that this would be a stranding ; because the vessel is in a situation she ought not to be ; for it cannot be a right situation for a ship to be sitting on a sharp stone.†

* *Corcoran v. Gurney*, Q. B., 1 E. & B. 456.

† The instance cited in the text seems to be in conflict with *Kingsford v. Marshall* (8 Bing. 458), where a ship was ordered by the

Fourthly, and lastly. The vessel, to be stranded, must cease to be water-borne. She must be hard-and-fast aground. A ship may drive over a ledge or reef of rocks or a bank of sand, thumping and striking as she goes with every sea, and do herself the most serious injury; she may knock off her keel, rip off the metal sheathing, carry away her rudder, &c., and spring a violent leak, and the assured will not be able to set up any claim as for stranding. Still less then will a single shock, however violent, on an isolated rock or on any fixed or floating substance, such as a wreck, avail to establish a stranding. Nor will it suffice for a stranding that a ship rests or beats *against* a rock or other substance. It frequently requires all the acuteness of the Adjuster to distinguish between cases that may so nearly approximate. And it requires an equal exactitude in the master, officers, and other persons present, when the accident takes place, to observe, and note in the log-book the particulars of it; since the result, in principle, may turn on a minute circumstance. For example, a vessel driving with her anchors down on to a lee-shore arrives at a point where she strikes or feels her bottom with the recoil of every sea; nay, so nearly may she be to a state of resting on it, that it can only be distinguished by the closest attention whether she is upheld by the water or not. And yet, in essence, the question depends upon the fact of her being or not being so upborne.

harbour-master to lie in a certain place, in a tidal harbour, and in taking the ground she struck on a hard substance and injured her bottom. It was held not to be a stranding. This, also, is an old case; and, in using it for a test, circumstances must be minutely examined. Besides, more recent cases of accident of this character have been looked at with greater liberality by underwriters, and accepted as strandings.

In fine, the difficulties respecting stranding arise principally from the circumstance of the grounds of decision being of so purely technical a character. Yet it must be admitted that questions of stranding would be even more debateable if some arbitrary rules were not adopted, however difficult they become in application.

WHETHER THERE IS ANY REASON FOR THE STRANDING
EXCEPTION TO THE WARRANTY IN CASE OF SHIPS.

It has been intimated that an arbitrary line was drawn to prevent frivolous and trifling claims on ship-policies, by making it necessary that the nett amount should equal or exceed three per cent. of the declared value of the ship in the policy; but that this did not apply to those charges called General Average, which are excepted from the warranty and are claimable irrespective of amount. It would indeed be absurd and very inexpedient to refuse to pay these charges because they are small in amount, for their very object is remedial and incurred in order to prevent loss, or to keep that loss as small as possible. The object of excluding damages to ship which are under three per cent. is to shut out trifling and vexatious claims; for hardly ever a ship arrives off a voyage without the necessity for some little expense; and without this limit in the warranty the owner might always run to the underwriters for payment of every paltry repair. The rule, however wholesome as it is generally, is relaxed in case of the stranding of the ship; and we are going to inquire whether there is any valid ground for this exception, and whether there is any advantage in retaining it. Stranding itself is

privileged, inasmuch as it was at first a clear and notorious cause of damage,—that is, stranding in its original and primitive meaning. But refinements have been made, and so many slight cases claimed to be admitted as strandings that, at last, the amount of damage received becomes not to be an essential feature in the question; and sometimes all the benefits of a stranding are given in cases where there is a moral certainty that little or no damage has accrued from that specific accident: so much so, that claims are often made for repairs of damages by stranding which do not amount to three per cent., or, as in many clubs, one per cent., of the value. But if by resting or striking on the ground or rocks a vessel receive no more damage than can be repaired for a sum under three or one per cent. of her value, it is clear that the damage is not of that violent character which the idea of *stranding* suggests to the mind. In fact, the cause of damage is no greater then than in some other of the frequent accidents which a vessel meets with in her navigation from boisterous weather, during which she splits her sails, carries away her bulwarks, &c., but which damages can all be repaired at something under three or one per cent. of her value, and are accordingly not recoverable on the policy. Nay, the ordinary wear and tear of a ship during a voyage, to her painted work, her running-rigging and small stores, would require a sum to reinstate her in the same condition as when she set out little short of the small per-centage required. There is, then, no reason why that small amount of damage should be admitted because a vessel has been technically stranded, since it is clear that such a stranding has caused her no more injury than she might have met

with from the ordinary events of a voyage, the occasional bad weather she usually encounters, and the wear and tear which necessarily attends her navigation. On the other hand, it is very plain that if a vessel meet with serious injuries—such as exceed three per cent. of her value—the exception to the warranty is needless, because a claim for repairs stands good without its assistance. In the case of goods there is a difference, and this argument does not apply; for there is no presumption, in the ordinary course of things, that they will be landed in any but a sound condition. Nevertheless, the rule as to stranding being sanctioned by long usage, and being found convenient, it is not likely to be changed.

OF COLLISION.

Though not recited by name in the body of the common form of policy, damage by collision is a very frequent and increasing source of claim on underwriters. It is one of the many casualties included in “all other perils, losses, and misfortunes” that may come to the hurt of the ship. Collisions are certainly more numerous now than they were formerly; and a very large proportion of collisions are cases in which one or each of the colliding vessels is a steamer. As would be expected, these accidents most frequently happen near coasts or in channels where there is much traffic. There are sometimes occurrences of this kind between two ships far away from land, on the high seas; but the chances of two vessels meeting on the same line, when there is the space of a whole ocean for each to move in, are comparatively few; so that when a calamity of this nature

takes place under such circumstances the strangeness of the coincidence seems to add a "supernumerary horror" to the event.

From the carefully compiled Abstracts of Returns relative to Sea Casualties made to the Board of Trade, we learn that in the twelve months ending 30th June, 1882, there occurred on or near the coasts of the United Kingdom,

80	cases of collision, resulting in total loss; and
606	partial damage;
<hr/>	
686	cases in all.

Even the foregoing large number of this species of casualty seems to call for congratulation, on comparison with former years: for

In the year ending 30th June, 1877, there had been 847 cases.

"	"	1878,	"	795	"
"	"	1879,	"	701	"
"	"	1880,	"	603	"
"	"	1881,	"	713	"

The average number of these six years is $724\frac{1}{2}$ collisions. Consequently the year 1882 was $38\frac{1}{2}$ cases under the average.

Of the 80 total-loss collisions in 1882, 18 occurred by day,
and 62 " night.

80

Of the 606 partial-loss collisions in 1882, 247 occurred by day.
and 359 " night.

606

The collisions between sailing vessels, only, were 16 with total loss.
" " " 282 with partial loss.

The remaining 64 cases of collisions resulting in total loss; and
324 " " partial loss occurred in connection with steam; either two steamers, or a steamer and a sailing vessel, were in collision.

Some further interesting summaries of marine losses and casualties will be found collected later on in this volume.

The special causes of collision appear to be—excessive speed, navigation at night, fog, the crowded state of our ports and Channels, and, as remarked in the *Wreck-Register*, the hampering of vessels' upper decks with cabins and other constructions, which shut out from view the object ahead of the ship. We fear we must add to these sources of disasters the great, but avoidable, one of bad look-out.

From the combination of two ships A and B in collision, four things may happen, viz. :—

The contact may be purely accidental; neither A nor B may be in fault.

A may be in fault, and B innocent.

B may be in fault, and A innocent.

Both may be in fault.

In the first case, each ship will bear its own expenses.

In the second and third cases, the ship in fault will pay the expenses of both vessels.

In the fourth case, if, as the result of cross actions in Admiralty both vessels be found in fault, the rule of the Court is to decree each vessel to pay to the other a moiety of the damage each has inflicted. The usual arrangement of these mutual claims is to deduct a moiety of the smaller claim from the moiety of the larger claim, and to pay the balance to the ship having the larger claim.

Whether considered as a mere adjustment of common liabilities, or as a penal infliction in respect of mutual

wrong-doing, this rule must, on reflection, appear strange and inequitable.

As the judgment of the English Court of Admiralty Division does not define different degrees of blame to each of the two colliding ships, the blame must be taken as equal; and as the size, value and damage of each vessel will rarely or never be the same, it will be seen that the incidence of the damages and the punishment for the wrong must always differ as between the two vessels, and occasionally will differ to an astonishing, and, it is to be presumed, an unintended extent.

A single and extreme example will be sufficient to make this clear.

Let A be a new, expensively built vessel, of the value of £10,000, and let B be an old collier valued at £1,000. Both ships receive damage, both are in blame, and both undergo repairs. Suppose the repairs to A amount to £1,800 and those to B to £200. The half of A's claim is £900, the half of B's claim is £100, the difference or balance is £800, which accordingly B must pay to A. Thus, then, *quâ* punishment, the penalty falls most heavily on B, the collier; unequally where the fault is equal on each side; for on the one ship a penalty of one per cent. is inflicted, and on the other a penalty of eighty per cent.

And regarded merely as a distribution of damage, the incidence of the loss would be arranged better by letting each bear its own damage.

But the most obvious rule by which the principle of mutual participation would be maintained, and the inequality of penalty be at the same time avoided, is that of dividing the joint losses and expenses on the united

values of the two vessels. By this, the dwarf would not be saddled with a giant's load, nor the giant escape with a dwarf's burthen. The faults being equal, there would be an equality of punishment.

Until quite lately the Admiralty Court spoke little or next to nothing of contributive fault and damages; that is, as to assigning different degrees of blame to each vessel concerned in a collision. On the continent the system is different. In some foreign countries the Tribunal, or the Expert Arbitrator, sets himself to discover and apportion the blame of each of the two colliding ships: so that in that part of the decree or award, it is stated, *ex. gr.*, that A is responsible for three-fourths and B for one-fourth of the causes of the collision: and the judgment assigns, on such grounds, to each vessel the amount it is to bear.

In the important trials of the *Chartered Mercantile Bank of India v. The Netherland Steam Navigation Company*,* the question of comparative blame was involved. A jury had found that the *Atjeh* was principally in fault, but that the *Crown Prince* was, also, in some degree to blame; and in the trial in banco the Court accepted and repeated the expressions as to contributive fault. Nor was this contradicted in the subsequent judgment of the Court of Appeal (17 Jan., 1883, *Times*, 18 Jan.) But the Admiralty Rule had been that where two vessels in collision were both in fault they must share the loss equally. And the Judicature Act of 1873 announced that when the rule of Admiralty in such cases was at variance with that of the Courts of Common Law, the

* Q. B. Div. 24th March, 1882, and M. L. C. Part LXI. O. S. p. 523.

former rule should prevail. This, therefore, must be held as settled law.*

How Underwriters are Affected.

We have now to see how the insurers are affected by collision.

* By either formula here given for settlement between two ships, both in fault, it will be seen that the results are the same.

FORM, No. 1.

Value of colliding ship A	£10,000, and of B	£1,000
Each has paid its own repairs	£1,800, and of B	£200
Total damage	<u>£2,000</u>	
Each vessel pays a moiety.		
B has to pay A one half		£1,000
Less what he has already paid		200
Leaving actual payment to A		<u>£800</u>
Being 80 per cent. on ship B's value.		
A has already paid		£1,800
Deduct recovery from B		800
		<u>£1,000</u>
Being 10 per cent. on ship A's value.		

FORM, No. 2.

Value of colliding ship A . . .	£10,000, and of B	£1,000
Repairs of each ship	£1,800 and	£200
B is to pay A one half	£900	
A is to pay B one half	100	
B has to pay A, balance	£800	
Being 80 per cent. on B's value.		
A bears one half of its repairs	£900	
A has to pay one half B's repairs	100	
Total payment	£1000	
Or 10 per cent. on A's value.		
But looking at the amounts as altogether penal,		
B is mulcted in £900, or 90 per cent. of her value.		
A „ £100, or 1 „ „		

Under the common form of policy, damage *received* by the ship insured is recoverable from the underwriters as one of the perils of the sea insured against. It is subject, like other damages, to the condition that it must amount, after deduction of a third for melioration, to three per cent. of the ship's value.* If the vessel receive independent damages besides those caused by the collision, both or all may be added together to make up the necessary franchise percentage; and indeed there is no distinction in their nature. If the ship which collides the vessel insured be in fault, still the damage is recoverable in the first instance from underwriters, and they may take their remedy against the ship in fault. When this is done in the name of the assured, they will empower him to sue or take other measures for recovery of the damage and undertake to pay the expenses of such proceedings, whether successful or not. Should they succeed, the benefit is their own. But inasmuch as the assured has had to bear his "thirds" of the repairs, he must equitably receive a similar proportion of whatever sum is recovered from the other ship; and it follows that he should share with the underwriters the costs of recovery. If an owner be only partially insured, he should contribute his proportion towards the expenses on the value uninsured. If the proceedings are successful, both he and the underwriters recover not only the damages to the injured vessel, but the costs of procuring restitution.

If the entire sum be not recovered from the colliding ship, but a smaller amount is accepted by way of com-

* When the words "a third," or "thirds" is used in the text, they are intended to refer to whatever deduction is made for melioration; which deductions differ according to the rules of clubs and the terms of insurance contracts.

promise, the particular items reduced not being specified, the payment will be applied *pro ratâ* to the whole amount of damages, outlays, and losses; and the compensation will appear as a reduction from the several columns of a statement showing the incidence of expenses on underwriter, ship-owner, and others.

If goods on board have been injured or lost, and the parties concerned have joined in procuring compensation, they will also share in the recovery obtained.

If the assured, whether from want of confidence as to the result, or from other causes, refuse to join with his underwriters in the expenses of trying to recover, and the underwriters succeed, what they so obtain is properly their own, though it may exceed the settlement they have made to the shipowner. Nevertheless, as insurers do not in such cases seek to make a profit by the transaction, they are usually contented to receive back from the assured the sum they have settled—it may be with interest—and thus cancel their loss.

So far as to damage *received* by collision. We now come to consider the position of parties when injuries *are done* by the ship insured.

There is nothing in the original words of the policy to make underwriters liable to the assured for the losses, damages and expenses which his vessel may cause, by collision with another ship, a wharf, a sea-mark, &c., or to goods, personal effects, or human beings. Any indemnity against these contingencies is grounded on a separate agreement, introduced in the policy when underwriters consent thereto. It is an extension of the protection they afford, and is a question of additional premium.

The following is a usual form of the Collision clause.

“ And we the assurers do further covenant and agree,
 “ that in case the said vessel A, shall by accident or negli-
 “ gence of the master or crew run down or damage any
 “ other ship or vessel, and the assured shall thereby
 “ become liable to pay and shall pay as damages any sum
 “ or sums, not exceeding the value of the said vessel A,
 “ by or in pursuance of any judgment of any Court of Law
 “ or Equity given in any suit or action defended with
 “ our previous consent in writing; or by or in pursuance
 “ of any award made upon reference entered by the
 “ assured with our previous consent in writing, we the
 “ assurers shall and will bear and pay such proportion of
 “ three-fourths parts of the sum so paid, as aforesaid, as
 “ the sum of £ , hereby assured, bears to the value
 “ of the said vessel A. But this agreement is in no case
 “ to be construed as extending to any sum or sums which
 “ the assured may become liable to pay or shall pay in
 “ respect of loss of life or personal injury to individuals
 “ from any cause whatever.”

Such is the express additional contract by which underwriters bind themselves in respect of injuries and expenses caused by the ship insured if in collision. It is not always expressed in quite the same words, or at the same length; and there is a legal prolixity in the form given above strangely in contrast with the curt irregularity of language of the policy itself. In some policies, especially those on steamships, the underwriter's liability is further restricted to a value per ton of the ship insured as the extreme limit.

The whole clause is founded on, or rather has reference to, that part of the Merchant Shipping Act and its amendments which treats of collision. Formerly, the

amount insured was to bear its proportion of the whole liability of the ship *and her freight*; but in the Amended Acts of 1862 and 1871, the mention of freight is omitted, and a maximum valuation is defined for the ship doing injury: in conformity with which alteration the word freight has been struck out of the clause used for policies. The language of the Acts is not very clear; but what is intended is that the owners of the colliding ship shall not "be answerable in damages in respect of loss of life or personal injury, either alone or together with loss or damage to ships, boats, goods, merchandise or other things, to an aggregate amount exceeding £15 for each ton of their ship's gross register tonnage; nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding £8 for each ton of the ship's tonnage," &c.

Those concerned in insurance understand these words to mean that the colliding ship, if in fault, shall be liable to the extent, but not beyond it, of £8 per ton of her own tonnage for loss and damage, exclusive of loss of life; and if there be loss of life, then to the maximum extent of £15 per ton. But underwriters refuse to take the liability of loss of lives, and confine themselves to material responsibility; and in the latter respect they limit their maximum liability to £8 per ton, and require that the injured vessel shall schedule its losses and damages, and show their actual amount. There are, however, mutual associations called Protecting Clubs which indemnify the insured shipowner against loss of life; and also the one-fourth deducted according to the collision clause inserted in ordinary policies.

In reference to this limit of risk a clause is very generally introduced in policies, to the effect that if the ship insured come into collision, and become liable to pay to the persons interested in the injured vessel, or her freight, or goods or effects on board, for "any sum or sums of money not exceeding the value of the ship hereby assured, calculated at the rate of £8 per ton on her registered tonnage,—we will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions hereto bear to the value of the ship hereby assured, *calculated at the rate of £8 per ton*, or, if the value hereby declared amounts to a larger sum, then to such declared value," &c.

The meaning of these provisos is that with regard to the liability to the injured ship, &c., the underwriters are limited, like the owner, to £8 per ton; but in respect to their liability to the assured shipowner, they have the option of comparing the sum insured with an £8 valuation of the ship, or with the declared value in the policy if that be more advantageous to themselves. Thus:—1. Let the vessel in fault be 200 tons: valued in the policy at £10 per ton, is £2,000. Amount actually insured £1,000. In this case the underwriters claim to pay in respect of any sum due, one-half. 2. Let the vessel be valued in policy at £8 per ton, and the ship run down require the maximum sum claimable, namely, £8 per ton; then the underwriters pay the proportion which £1,000 insured bears to £1,600, or five-eighths; their payment not being affected by the £8 clause. 3. Let the ship be valued in policy at £6 per ton, *i.e.*, £1,200, in this case they claim the relief afforded them by the £8 valuation; and instead of paying in the proportion which £1,000 bears to

£1,200, they pay (in respect of damage done to the other vessel) the proportion to £1,000 to £1600.

It must be added that a maximum liability of £8 per ton—especially with steamers—is very inadequate: the value of steamships with their machinery being often £20 per ton, and upwards. If a steamer run down another steamer, a recovery from the vessel doing the injury limited to £8 per ton is insufficient as regards the ship run down or extensively damaged, and is generally inadequate in respect of the declared value in the policy of the steamer doing the damage.

The deduction of one-fourth from the damages and costs, stipulated by the collision clause, is purely conventional, confirmed by statute, and its object seems to be, by throwing a fixed portion of the consequences of a collision on the assured, to induce owners and their crews to be careful and cautious. Many of the mutual sailing-ship clubs do not make this reduction, but pay in full.

Claims for damages done by collision are payable by underwriters without reference to the franchise, or proportion they bear to the colliding ship's value; and on Lloyd's policies they are not allowed to be added to damage received by the colliding ship, to bring the latter class of damages to the necessary per-centage. This addition is, however, permitted by some of the clubs.

Some persons entertain the opinion that damages done by collision cannot be recovered on the colliding ship's policy if both the ships in contact belong to one owner. There does not appear to be any valid ground for this view. The circumstance of the oneness of ownership is a mere accident and cannot interfere with

an underwriter's liability under the collision clause. Were it otherwise a proviso to that effect would, ere this, have been added to the clause.

The long contest, ending in the House of Lords, which took place in the case of the *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.** does not contradict this. The intricacies of that cause arose on a claim for some specie (cargo) lost, and the exceptions of ship's liability contained in the bills-of-lading of both ships. The individuality of each steamer was shown by the result,—that the clauses in the bill-of-lading of the ship in fault, or most in fault, could not be read into the freight contract for carrying the specie, so as to relieve the contractors, who were owners of both steamers, altogether from liability; though they did act as an exemption in the case of the vessel in which the specie was shipped under a bill-of-lading containing those exceptions, which vessel was also, but slightly, in fault.

It may be mentioned that apart from the policy of insurance, collision (as by bill of lading) is not necessarily a “peril of the sea;” and was so held in *Woodley v. Mitchell†* on appeal from a decision of Mr. Justice Hawkins.

The risk of possible consequences under the collision clause is very great. If the ship in fault sink another vessel, and also sink herself, the underwriters are liable up to £8 per ton for the ship run down, and to the amount of the policy for the loss of the vessel insured, together with costs of action, &c.

* 3 B. & S. 873, and 5 B. & S. 348.

† Weekly Notes, 1st March, 1883.

The exemption of underwriters in respect of personal injuries is strictly confined to injuries to the person. They are liable for the clothes and effects of the persons so injured or suffering loss.

Recovery of Damages by Collision.

It is generally difficult to decide at once which side must bear the blame and the consequences in a case of collision. The evidence offered by the persons on board each of the colliding vessels is *ex parte* and often singularly contradictory. Meteorology seems at fault; winds blow from different quarters; and the moon appears to have a habit of rising on one ship and not the other. Each side protests that their own crew were on the look-out and unusually alert at the time of the accident, keeping their lights burning brightly, &c., whilst no lights were observed on the other vessel, and no vigour in shouting could rouse its crew from their slumbers. Such partial and strongly coloured accounts are natural efforts made by responsible persons to defend themselves from blame and the shipowner from loss. These contradictions lead generally to the chamber of the arbitrator or to the Court of Admiralty for solution. The proceedings in the latter tribunal are *ad rem*. The ship doing damage may be arrested, and should she be condemned to pay for the injuries and expenses of the collision, she may be sold, and her proceeds (up to £8 per ton) be applied to satisfy the claimant, after payment of the prior claims of crew's wages, and, if there be one, a bottomry bond. If loss of life have happened the limit is raised to £15 per ton.

If several interests have claims against a ship for

damage by collision they may unite in an action, and they will receive rateably and equally with the amounts of their damages out of the sum recovered, supposing that insufficient to satisfy all the claimants in full. If one of the damaged interests brings an action, first and alone, it will be satisfied in full, or to the full extent of the available sale of ship. If other interests, after that, commence actions, and the ship in fault be sold, they will only recover from the balance, if any, remaining after payment of the previous claimant. If the ship in wrong be not sold, but the owner of her pays the first claimant's damages, the vessel may again be libelled and be sold in answer to subsequent claims by other interests which have received injury. There does not appear to be any limit to the number of consecutive payments which may thus be enforced against the ship doing damage. This danger is, however, so notorious, that it is now a rare thing to find the precaution omitted of procuring limitation of damages, for the ship in fault; and, on the other side, of claimants omitting to aggregate all claims against her, so that each may receive his proportionate share of the £8 per ton, when the total claims exceed that limit.

With regard to costs there are a few difficulties. If for the attack or the defence in an action for collision, the costs, even clients' costs, will give no trouble on the successful side. The usual collision clause contains a proviso that before proceeding to legal measures either of attack or defence, the insurers' consent shall be obtained. Without this, in an unsuccessful result the insurers might (and quite properly) refuse to pay or contribute to costs. It very frequently happens that each of the

colliding ships commences an action against the other. Suppose that A is in the wrong, and has received in the contact some injuries herself, not amounting to the franchise amount in her policy, underwriters would reject costs undertaken to obtain payment for those damages from B, because the damages are insufficient to establish a claim for Particular Average, yet, with underwriters' consent, the costs of a colourable attack or defence might have their approval, and be paid by them, when their object is to reduce damages by making a bold show. This innocent device is sufficiently understood; and is excused on the same grounds on which a ship finding a collision inevitable, puts, at the last moment, her helm the wrong way, to secure a sliding blow and avoid a more direct one. One practical advantage gained is that of posing as plaintiff and securing the leading counsel; for in law as in physics, the momentum of a body in motion overcomes the resistance of the stationary body it impinges, though the latter be of equal bulk and hardness.

When underwriters' consent has not been given to such factitious attack or defence, the assured is at their discretion to pay or refuse the costs. Yet if these have been advisedly taken for the purposes of limiting damages, they are sometimes admitted by underwriters, although formal consent has been omitted to be obtained. Of course if underwriters refuse to give this consent, they cannot be enforced to a payment of such costs.

Causes of Collisions, &c.

It is unnecessary here to enter into the subject of the causes of collision and its increasing frequency. It is

certain that this species of risk has been greatly augmented since the adoption of steam as a locomotive power at sea. The restlessness of steam navigation and the great speed with which vessels are propelled perpetually lead to contact with other ships and craft, especially about coasts and harbours. Undoubtedly a large number of such catastrophes might be avoided by great precaution, lower speed, and strict attention to the Admiralty directions as to lights and the rule of the road. Insurers have a right to expect that masters who have so much property in their charge will act prudently and vigilantly, and not imperil it by foolhardy or irregular acts. The subject of lights is all important in the Admiralty Court; and the present rule of the road is perhaps the best that can be devised. Yet a slavish obedience to the letter of that rule, when it is plain in an emergency that a deviation from it would prevent a collision, will not save a master from censure. "Even a blind adherence to those rules will not absolve a vessel from blame, if, by persisting in her course, a collision is occasioned which she might have avoided."—*The Commerce*,* *The James Watt*.†

Different Classes of Average to be distinguished.

In concluding this part of my subject it is added that to be in good form the Average Adjuster in stating claims observes the distinction between General Average and Particular Average, even when the expenses relate to a ship that has neither cargo nor freight to contribute,

* 3 W. Rob. 287.

† 2 W. Rob. 270. See Digby Seymour's Supplementary Notes to Merchant Shipping Acts.

and to divide those expenses with her. The distinction in such a case is one of principle, yet sometimes it is necessarily upheld, to avoid confusion. General Average is claimable without reference to amount, whilst Particular Average is only recoverable from underwriters when it exceeds the warranted minimum limit. Formerly, when even all the expenses consisted of repairs, but arose partly from natural accidents and partly from voluntary sacrifices of the ship's stores or fabric, and when all fell finally together on the ship because she was without cargo or freight—the two classes of claim were required to be distinguished and afterwards kept apart; and the Particular Average, if it fell short of three per cent., was not to be eked out by the addition to it of the General Average. The authority for the principle of keeping claims distinct which are different in nature, was that of *Oppenheim v. Fry*,* where a steam-ship being on fire received damage both from the burning and from the voluntary means which were taken to extinguish the fire. She had no cargo or freight, but her hull and machinery being insured as two separate interests, with Average payable on the sum total or on either interest, she was in the same position as regards the present question, as if she had had cargo or freight on board. The damages by fire to the hull did not amount to three per cent. of its value. The machinery was also damaged, but it was by water or other means used for putting out the fire. It was held that the latter damages must be apportioned to the two separate interests. When the portion falling on the hull was added to the Particular Average the united sum was still below three per cent.,

* 5 B. & S. 348.

and the shipowner could not recover from his underwriters. The judgment fell short of deciding some important parts of the question.

The rule now is, supported by the analogy of *Dickinson v. Jardine*,* that the damages to a ship, if amounting in total to the franchise in the policy, are claimable from ship's underwriters, although there is a right over for recouping part of the repairs in the way of contribution as General Average from other parties. A little mystification has been produced in the matter by the insistence of some persons in calling the repairs claimable in general contribution *Particular Average*. No advantage comes of ticketing two things by one name. By a process of reasoning, an expert may justify to himself this nomenclature, but it only confuses the rest of the world. What is really meant is that repairs to ship, whether in General Average or Particular Average, or in both, are claimable direct on the ship's underwriters. What is recoverable elsewhere is to their good, as a credit to their indebtedness. In practice the Adjuster divides at once, for convenience sake, the General Average; apportions it; and carries out to the ship its quota; and this without impugning the principle of the ship-underwriters' liability for the whole damage.

* L. R. C. P. 639.

PART THE THIRD.

OF PARTICULAR AVERAGE ON GOODS.

CLAIMS for loss on merchandise insured by perils of the sea, &c., are technically distinguished as follows :—

1. Total loss of the whole interest.
2. Total loss of part of the interest. (Sometimes called a Partial Loss, and sometimes Particular Average.)
3. Partial loss; by a sale at some intermediate place. (Called also a Salvage Loss; a Constructive Total Loss; or a Total Loss with Salvage.)
4. Particular Average.

Concerning the First of these divisions it will be convenient to postpone any remarks on the subject until we come to consider the whole matter of Total Loss in one view.

The Second,—Total loss or part may consist of the absolute loss of one or more packages of goods; as by an accident at the loading or unloading of cargo, upsetting of a boat, and the like. Or, it may consist of the complete washing out of some packages by the sea-water that has entered the ship; or the rotting and entire worthlessness of a portion of the cargo from the same cause. These are rather of the nature of Particular Average, and are generally classed with it in adjustments.

The Third,—Partial Loss, Loss with Salvage, or Constructive Total Loss, consists in the sale of goods damaged by sea perils at some intermediate place where the ship has put in and the goods in question are sold at the recommendation of surveyors.

The Fourth,—Particular Average, properly so called, consists of the depreciation of goods owing to sea perils, ascertained at their place of destination ; the depreciation arising from the deterioration of the quality of the goods, or from a reduction in quantity, or from both combined. It should be observed that there is no specific difference between the three last claims, which, except in name, are subject to the same tests, and really mean one thing, viz., the loss or depreciation of the substance insured, as distinguished from claims in respect of the thing insured by reason of expenses and sacrifices. The term Partial Loss or Salvage Loss carries no privilege with it now, whatever it may have done formerly. Particular Average adjustments embrace two subjects, viz. :

The deterioration of the goods by sea-water, or by fire ; and

Extra charges, in consequence of the goods being sea damaged.

Before entering upon a more detailed examination of the various claims on goods it will be necessary to refer again to the policy and observe those clauses and expressions which apply especially to merchandise.

Subject-Matter and Scope of the Insurance.

The policy states the general intention of the insurance to be “upon any Kind of Goods and Merchandise ;” and its period of endurance to be as follows:—“beginning

the Adventure upon the said Goods and Merchandises, from the Loading thereof aboard the said Ship, * * * and so shall continue and endure * * * until the said Ship * * * and Goods and Merchandises, whatsoever, shall be arrived at,"—(here the destination of the interest is inserted ;) "and upon the Goods and Merchandises, until the same be there discharged and safely landed." *

The Risks insured against.

The statement of perils, &c., covered by the policy is the same on goods as on the ship; there being nothing special to or exclusive of merchandises in all that portion of the policy which is printed in large roman type.

The Warranty or Memorandum.

But the Warranty contains special matter relating to goods, of very great importance; for it excludes some

* In *Harrison v. Ellis*, 7 E. & B. 465, an attempt was made to throw on a time policy on goods the risk of cargo in a warehouse on shore. The insurance was one upon a fluctuating interest, viz., on goods in the bartering trade of Africa, intended to protect a certain amount of value whether the interest happened to be outward goods, produce home, or intermediate goods whilst bartering. There was oil in a factory on shore, from which factory the homeward cargo would have been shipped; but it never left the warehouse, which was burnt before any of the oil was sent on board. Lord Chief Justice Campbell and the other judges in delivering their judgment are conclusive that goods in a warehouse on shore, whatever their destination may be, are not, in ordinary circumstances, and without a very special clause to the effect, interest attaching to a marine risk. This remark does not apply to goods discharged from a ship in a port of distress and there warehoused. These latter remain at the risk of the underwriters who have insured them.

species of merchandise from restitution in case of damage, and it fixes the limit of deterioration which must be reached in other species in order to constitute a claim on the underwriter, viz.: "Corn, Fish, Salt, Fruit, Flour and Seed, are warranted free from Average, unless general or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins, are warranted free from Average under Five Pounds per Cent.: and all other Goods are warranted free from Average under Three Pounds per Cent.: unless general or the Ship is stranded."

To this must be added another exception to the Warranty, found in most policies on goods, "unless burnt," or "on fire"; and the further admission of liability, met with in many instances, in favour of "collision." The franchise also, whether exclusive altogether, or rejecting damage under three or five per cent., is susceptible of alteration at the will of the two parties to an insurance; for by consent these can contract themselves into or out of conditions, varying the common form of the printed policy as it suits their particular views or needs.

Thus, then, the policy gives security to the goods from the moment they are loaded on board the ship. And there is generally a further clause added in writing to this effect, "Including risk of Craft and Boats to and from the Ship"; so that protection under the policy commences from the minute the goods leave *terra firma* to be taken to the ship, when it is necessary to cross water to do so, and that protection ceases simultaneously with their safe arrival on shore at their destination. The written clause of craft risk *from* the ship appears, indeed, superfluous here, since the wording of the policy itself

continues the underwriters' liability until the goods are safely landed.

Yet it is not without its significance. A delivery into a lighter craft is sometimes made equivalent to a landing; and when it is so, the underwriters' risk ceases when the goods are in the lighter. The latter may have to convey them to a considerable distance, *ex. gr.*, for trans-shipment by another vessel; or it may be convenient to the merchant who sends his lighter to take such delivery, or employs a lighterman or wharfinger to do this for him, to let the goods remain in the craft for a time. This is a new risk, and one which the sea-policy does not cover.

Then as to the question of delay on the ship's part in landing her cargo. A varying time is required in different places for landing. Where the detention on board of goods is not necessary, the delay may be to the increased risk and detriment of the underwriter, who ought not to have his risk prolonged at the will or for the convenience of the shipowner or master. In the case of the *Whitecross Wire and Iron Company v. Savill*,* which was tried on a question of the shipowner's liability to pay General Average, it was urged in his defence that the voyage was ended before the act creating a general contribution occurred. Indeed the delay, from whatever cause, was very long,—from the ship's arrival at Wellington, New Zealand, on the 25th January till the 16th of February, on which day a fire broke out on board. The Court held that though, in one sense, the voyage was at an end, the mercantile adventure had not ceased. The goods which remained on board, and were damaged by

* Appeal, M. L. C. Part LXI. O. S. p. 531.

water thrown down, were still cargo and under maritime law. How far a delay in landing goods affects underwriters will depend on the facts and circumstances of the case.

A very considerable difficulty sometimes arises in reference to goods in lighters. Thus: goods were insured to Gibraltar "till safely landed: including all risk of craft, &c." By a distinct policy, the same goods were insured "at and from Gibraltar," with craft risk included. In point of fact, the goods never were landed, for there was no wharf or warehouse vacant to receive them. They remained in lighters many days, with the object of their being loaded as soon as possible on board the trans-ship: but before this could be effected the lighters were sunk by a hurricane. Both policies, as stated above, contained the craft-risk.

In lighter-claims, although not perhaps sufficiently observed hitherto, there is frequently an overlapping of interests, and, without suggestion of fraud, a double insurance exists.

The warranty now, as in the case of the ship, interposes to protect the underwriter from insignificant, frivolous, and vexatious claims. But as affecting merchandise it has other important objects. There are certain kinds of goods which are more susceptible of injury than others; and there are some which contain, as it were, the causes of deterioration or destruction within themselves, so that the very smallest access of sea-water to them is able to set on foot an action which may afterwards go on and damage or waste them to a great extent. Nay, ordinary causes, such as humidity of atmosphere, the heat of the ship's hold, or the dampness

that commonly is found in a ship, will produce deterioration, decomposition or germination without needing more definite accidents. And then the difficulty of attributing damages of this kind to their authentic source, and the still greater difficulty of distinguishing between damage where two causes have been at work, have made it expedient, both in order to avoid disputes and to obtain a moderate scale of premiums, that either such goods should be excluded altogether from Average claims or that a higher limitation should be put upon them. But here again, as with ships, a stranding destroys the warranty and lets in a claim against underwriters be it large or small. It is useless to discuss farther either the reason or the usefulness of this regulation, but it is invariable.*

As one advantage of this limited liability with regard to claims for Particular Average is to prevent the necessity of excessive premiums, it stands as a general condition: but in cases where it is desired to obtain a larger indemnity a special agreement can be entered into with the underwriters, making fresh terms as to the payment of Average in consideration of giving them an extra premium for that additional risk. This agreement being made in writing will override the usual printed warranty.

In some foreign policies the warranty has a rather different signification. It not only requires that the damage should amount to a certain proportion of the value of the goods insured, but it gives to the assured

* Where there is the exception, in favour of the assured of collision, it is usual to insert, "if *occasioned* by collision; and that of a kind which might reasonably be supposed to lead to such damage."

in case of Average only that portion of the loss which *exceeds* the agreed limit, which is there called the *franchise* or *affranchisement*. We shall see hereafter that this arrangement is adhered to in English policies in the case of one particular kind of goods.

Formal Distinction between Partial Loss and Particular Average.

A Partial Loss and a Particular Average are distinguished in this respect,—that the former is a loss arising on damaged goods which are sold at some place short of their destination; and the latter is the loss arising when damaged goods are sold at the proper termination of the voyage. In both cases the original cause of damage must be a peril of the sea, which includes fire and some other things; and in both, the loss sustained by the damage of the insured article must reach the agreed limit, whether three, five, or ten per cent., of its value or the value of a given quantity, named a series, “unless the ship be stranded;” or, as it is now common to insert, “unless the ship be stranded, sunk, or on fire.” By this latter condition the warranty which makes some goods altogether free from Average, and others free below certain ratios of value, is destroyed. So the distinction in claims is reduced merely to one of form in the adjustment of the loss:—Particular Average being ascertained by comparing the sound and damaged values of the injured article at its place of destination; whilst in Partial Loss the claim on the underwriter is found by deducting the net proceeds of the damaged goods from their insured value.

OF A TOTAL LOSS OF PART OF THE GOODS INSURED :
 —SOMETIMES CALLED A PARTIAL LOSS, AND IN
 OTHER CASES, PARTICULAR AVERAGE.

The Average Clause.

The policy contemplates in its provisions each single interest insured. When it speaks of three per cent. or five per cent. it means that proportion of the whole interest in any one description of goods. When more than one description of merchandise is included in the same interest,—as when silk and tea are shipped by one person in China to one person in England, or cotton and wheat are shipped at Alexandria, in the same way,—the policy does not confound the descriptions of goods; each is to stand separately on its own basis as regards its warranty. But it often happens that separate interests are insured on the same policy. Although they are thus accidentally united by being on the same document, they are to all intents and purposes distinct assurances; as much so as if each had its separate policy. The claim, then, must be tested by observing whether it amounts to the necessary percentage on the entire interest, if of one kind of goods only; or on the whole value of each description of goods when there are more than one contained in the interest. This distinction of species has been dwelt upon in the two cases, more fully mentioned hereafter, of *Entwistle v. Ellis*,* and *Wilkinson v. Hyde*.† It is to be recollected that in law the word “species” is not used in a scientific sense: thus, in a policy on

* Common Pleas, 2 H. & N. 549.

† Common Pleas, 2 C. B. N. S. 30.

“fruit,” if there were oranges and lemons, the loss of all the lemons would not be exigible on the underwriters if the oranges remained. The botanical distinction of species is not recognised.

When goods are shipped in separate packages, a concession is usually made by the underwriters that they will not only pay a claim if it amount to the warranted limit on the whole interest, but also if it rise to the limit on certain specified divisions of the interest. This permission is legally pronounced to be *cumulative and not restrictive*; that is, it confers an additional advantage to the person insured, and is not to act against him by taking away any part of his original right. This is called the Average Clause. It is fixed variously. In some particular trades it amounts almost to a custom; as with West India sugar, where the clause is nearly invariably, “to pay Average on each ten hogsheads, of following landing numbers.” In other cases it depends upon the desire of the assured or the views of the underwriter. But if it is wished to avoid disputes when a claim arises, some agreed Average clause should always be inserted in the policy. The general intention is to give the assured considerable protection, but not to reduce the subdivisions of an interest very low. Thus we see such Average clauses as the following;—“On each Bale of Silk.” “On each Case or Seron of Indigo or Cochineal.” “On each five, or each ten Bales of Wool.” “On each twenty Bales of Cotton.” “On each ten Chests or twenty Half Chests of Tea.” “On each fifty, or one hundred Bags of Sugar or of Rice.” “On each Case or Bale of Manufactures.” “Each Cask of Hardware.” Sometimes it is specified that these sub-

divisions, or series as they are called, are to be connected by their coinciding with following invoice numbers; sometimes with following landing numbers; sometimes the option of either is given. But in the quantity contained in a series, in the order in which it is to be taken and other matters, there is a wide range for various stipulations between the assured and the assurers.

The introduction of the Average clause is, of course, of great advantage to the assured; for by its action a comparatively small loss becomes claimable against the underwriters. Thus, the loss of a single package is five per cent. upon twenty packages, and the loss of a package - and - a - half is three per cent. upon fifty packages.

These preliminary remarks embrace generally claims for damage to all descriptions of goods. We will now see their bearing upon that part of the subject immediately before us.

If, owing to perils of the sea, a ship laden with a cargo in bulk, such as wheat or salt, both which are warranted "free from Particular Average" by the printed memorandum, puts into a port of distress and there sells a portion of her cargo in consequence of damage, the loss by that sale is not claimable on the policy. Practice has changed in this respect. Within recollection it was customary to pay as a partial loss any loss which might happen to the wheat, &c., at an intermediate port; but since then it has been decided that the warranty of "free from Average" protects the underwriter, and that there can be no claim for loss on a cargo in bulk unless the whole of the cargo was sold damaged.

If, however, goods insured “against total loss only,” are of different kinds, and a portion of the interest insured be saved, there may still be established a claim for total loss :—of course, minus the value of what is saved. (*Wilkinson v. Hyde*.*)

An important question presented itself, a few years ago. Put in simplest form it was this :—Suppose the ship A, having received damages at sea, put into an intermediate port, and was there condemned and sold. The cargo had to be forwarded to its destination, but no vessel sufficiently large could be found to convey the whole of A’s cargo, and it was, consequently, divided: one-half being trans-shipped by a vessel B, and the other half by C. B arrives at destination, but C and her cargo are lost. What was the assured’s position? Could he claim for a total loss of half A’s original cargo; or would the arrival of half the cargo in B debar him from a claim on his Free-of-Average Policy? To avoid any future discussions and litigation, a clause was devised, and is in very general use, being attached to policies of this kind. It reads as follows :—

“Warranted free from Particular Average, unless the ship or craft be stranded, sunk, or burnt; but to pay landing, warehousing, forwarding, reshipping, and special charges if incurred, as well as partial loss arising from trans-shipment. Each craft or lighter to be deemed a separate insurance.”

Such was the clause. The latter sentence rather serves to confirm the general meaning of trans-shipment. Its language is clear to those who knew its birth and original intention; but a different meaning is assigned

* 2 C. B. N. S. 30.

to the words by those who read them without explanation. They, both lawyers and laymen, see in this clause a contract by which insurers bind themselves to pay any loss that may occur during the trans-shipping of goods by the substituted vessels. And no one can doubt that such is the more obvious sense conveyed by the words. There are now several varied forms of the clause framed by merchants and brokers who introduce this provision in policies; and one of them sufficiently shows what the framer supposes to be the intention of it, by adding, "during the reshipping or trans-shipping of the cargo." And indeed it is probable that when the distinct point is brought for legal decision, the Court, in taking on itself the interpretation of a contract, may decline entering into the occasion and intention of the original clause, and determine the stipulation on the most direct signification of its language.

The case is different with those goods which are not warranted free from Average. The circumstance of their being contained in separate packages forms a distinction between them and goods in bulk for some purposes. Until the year 1856, it had been considered to be decided that the entire loss of any one package, however small, was a total loss of that package, and, as such, recoverable from the underwriters; so that the total washing out of one or two bags of sugar or saltpetre, for example, was a total loss of part and as such payable by the underwriters. But though the authority was high, this doctrine had always by many been doubted; at any rate, it had very rarely been acted upon. It was considered that the entire washing away of the contents of a package was not different in essence to the washing away

of half or of any other proportion of the package: it was merely a difference in degree, and did not change the nature of the loss:—that decrease in quantity in perishable commodities is a thing anticipated, like the depreciation in value; and that, though it may be legally termed a *loss*, or a *total loss of part*, it is really and strictly a Particular Average, and should be subjected to the test of coming up to the required proportion or per-centage of the warranty.

The question was not likely to arise in packages of manufactured goods, which are usually declared subject to Average on each package, by the warranty; nor upon some descriptions of goods which are shipped in large packages, such as West India sugar in hogsheads, of which the entire loss of a single package forms always a loss exceeding five per cent. on the number allowed by the Average clause. In the latter case, whether a hogshhead were entirely washed out by sea-water whilst in the ship's hold, or were lost in shipping or discharging by a boat being swamped, or by slipping out of slings or can-hooks whilst being raised or lowered, it is claimable under the same conditions as Particular Average, and it would not be more privileged than that. It would be claimed in virtue of the loss reaching five per cent. on the value of a series of ten hogsheads, and not on other ground.

The law was settled on this important subject by a very lucid judgment delivered in the Court of Common Pleas by the late Chief Justice Jervis. It was one of the last of that quick-sighted judge's public acts, and it is full, elaborate, and convincing. In the judgment of *Ralli*

v. *Janson** it will be seen that the late learned judge of the Common Pleas shows the distinction between *separate packages separately valued and insured*, and packages in which *bulk cargoes* are sometimes packed for convenience, but without the intention of making them packages separately valued and insured. The cargo of wheat, which was the groundwork of the action, happened to be packed in bags, and some of these were so damaged as to be utterly worthless. But it was never contemplated by underwriter or merchant that the circumstance of the wheat being in thin bags was to affect the principle of the indemnity, or change the usual warranty of a bulk cargo, "free of Particular Average." The judgment abolishes the *prestige* created by the expression *total loss of a part*, and looks only to the absolute intention of the parties and the animus of the policy, which is to keep the underwriter free from loss arising from deterioration or destruction by sea-water except it be complete of the entire shipment. So that four bags of sugar quite destroyed out of a series of one hundred bags are not claimable, because they do not amount to five per cent. on that series of a hundred. When the intention of the parties is really to make a virtually separate insurance on each package, so that a single package shall be claimable if lost, it is so expressed in the policy. Thus we often see wool declared "to pay Average on each bale." If, on the contrary, the insurance is on goods which from their nature make a restriction of the underwriter's liability to entire destruction necessary, the factitious distinction of putting the article in bags, giving it no materially increased safety, and of course not affecting

* 6 E. & B. 423.

its inherent qualities, will not operate against the insurer.

This decision commends itself in rightly apprehending the spirit of the Average clause and the essence of the question; that it protects insurers against claims in consequence of sea damage when declared *free*, or liable under certain limitations, although the claim is put in a new form, and is called by another name. What the real intention of the parties was at the time of making the insurance, is frequently determinable by the rate of premium, for that will generally show whether the underwriter took a limited risk, or a very hazardous one, on himself.

The subsequent cause of *Entwistle v. Ellis* * (Common Pleas, Nov., 1857), confirms *Ralli v. Janson*,† but is not so leading a case, on account of the technical nature of the judge's reasoning, which turned mainly on the restriction of after-declarations on a warranted policy. The insurance was on "Rice, free from Particular Average." The assured afterwards declared on the policy the number of bags constituting the interest, and their value, at per bag. It was clearly laid down that such a subsequent declaration is not allowed to defeat the very animus of the contract between the underwriter and assured, viz., that the rice should be free from claims for Particular Average.

During the trial of *Wilkinson v. Hyde*,‡ cited above, Justice Byles said, "Since the decision of *Duff v. McKenzie*,§ the expression 'total loss' is ambiguous,

* 2 H. & N. 549.

† 2 C. B. N. S. 30.

‡ 6 E. & B. 423.

§ 2 C. B. N. S. 16.

and may mean a total loss of the whole thing insured, or a part, *secundum subjectum materiam*."

However, looking at the subject from the two directions, of *Ralli v. Janson* and *Entwistle v. Ellis* on one side, and *Duff v. McKenzie* and *Wilkinson v. Hyde* on the other, it assumes a tolerable completeness. Yet latterly opinion seems somewhat swaying back to allowing separate packages, if of some importance in value, to be individualised as distinct interests. At least, in practice, the liberality of companies and underwriters sometimes acts on such a view. They would not, however, allow a single bag of rice or a mat of sugar to figure as a separate interest: but in more valuable packages the entire loss of one of them would probably be allowed, though excluded by the franchise in the policy from being claimable of right.

Loss of Goods in Shipping and Discharging.

We have referred to goods being lost whilst loading on board or discharging from the ship. If a package be lost whilst being raised or lowered, before a claim can be made on the underwriters for it it must be shown that the loss did not arise from want of care and precaution;—that, for instance, the tackles employed were of sufficient strength for the purpose; it must be shown to have been occasioned by an accident or peril of the sea, and not from the ordinary mischances which attend marine and all other affairs.

Loss in Boats and Craft.

As previously mentioned, the wording of the policy protects the interest insured until it is safely landed; so that even if boats or craft be required for that purpose, any loss accruing from their use will fall on the policy. But at shipment this risk requires a further provision to be added, because the insurance is only declared to be "from the loading thereof aboard the said ship." The usual clause supplied in writing, however, provides for "risk of craft," &c., at each terminus of the voyage.

The great commerce which the shipment of grain in the Danube has occasioned, and the peculiarities of the navigation of that river, have required some special stipulations in policies from the Black Sea to make them effectually cover all the risks of that particular trade. In nearly all cases, loaded vessels before attempting to cross the Sulina Bar reduce their draught of water by discharging part of their cargoes into lighters, and taking it on board again after they have passed the Bar. It is frequent now in these policies to provide for the loss of such lighters by declaring each lighter of grain to be a separate interest; meaning only until the corn is received on board again. The Yenikale Bar, near the mouth of the Don, is another place of difficulty.

In some places the use of lighters in landing the goods is unavoidable and constant. In other places the transit in craft is very long. Goods intended for St. Petersburg have to go all the way from Cronstadt in steam and other lighters.

In the ordinary course, *i. e.*, without the proviso of

each lighter being a separate interest, a boat-load of cargo insured by the entire bulk is not claimable on the policy unless it amounts to the prescribed limit or percentage on the whole cargo; and with free-from-average insurances it is not claimable at all, though the whole boat-load perish. The risk is one, both in the vessel and in the lighters or boats, except otherwise stipulated in the policy; and it ought not to be attempted to bring in a claim by a side-wind. This being so, it is very difficult to discover what advantage is derived from the clause commonly inserted in policies "including all risk in craft and lighters," since the loss even of a lighter is not sufficient to constitute a claim. With the "separate lighter" stipulation, the stranding or burning of a lighter does not let in a claim on the cargo in the ship; but the stranding, &c., of the vessel would probably allow the damage to goods still on board a lighter to be claimed, supposing them to be injured independently on their way *from* the ship: even, perhaps, when going *to* the vessel for shipment.

ON LOSS WITH SALVAGE; SOMETIMES CALLED A SALVAGE LOSS OR A PARTIAL LOSS, AND SOMETIMES A CONSTRUCTIVE TOTAL LOSS.

When a vessel having met with damage at sea has been obliged to put into some port for repair, it is very commonly the case that a survey is held on the cargo to ascertain its condition and whether it has been injured by access of sea-water. If damage be suspected this is almost invariably done. The surveyors who have been appointed to inspect the goods, not only report on their

condition but usually advise the course which should be adopted in respect to them. The sound are, as a matter of course, to be reshipped; those that are very slightly injured the surveyors frequently recommend to be dried or otherwise put into condition and sent forward to their destination; but when they find goods materially damaged they most generally advise a sale of them on the spot. This is done, first, because it may be the only means of saving *any part* of their value,—damage in some cases being progressive when once commenced, and it may go on even to the entire annihilation of the species of the goods. Secondly, the damaged goods by remaining in the ship may occasion injury to other goods in their vicinity, and, indeed, may deteriorate a whole cargo by their presence.

The claim on goods thus sold at an intermediate port is called a Partial Loss, a Salvage Loss, or, a Loss with Salvage. The name is of no very great importance; the original idea connected with such loss is, that the work of destruction is going on in the goods; that if it be attempted to carry them on to their destination they will arrive there valueless, and that, therefore, the selling them at an intermediate port is the only means of saving part of their value to the parties concerned.

This was the argument in the leading cause of *Roux v. Salvador*.* The subject-matter of the insurance was hides, shipped on board the *Roxelaine* at Valparaiso, bound to Bordeaux, and warranted “free from Particular Average.” The ship owing to stress of weather was obliged to put into Rio de Janeiro. The hides were found to be so much damaged that it would be im-

* 3 Bing. N. C. 266.

practicable to carry them *in specie* (that is, in their own character and form of hides) to the end of the voyage,—they being in such a state that they must either have been annihilated by putrefaction, or thrown overboard. They were sold for one-fourth of their value. It was held that this was a loss total in its nature. Lord Abinger in delivering the judgment of the Court said, “If the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped into the same or any other vessel; if it be certain that before the termination of the original voyage the species itself would disappear, and the goods assume a new form, losing all their original character; if, though imperishable, they are in the hands of strangers not under the control of the assured; if by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination; in any of those cases the circumstance of their existing *in specie* at that forced determination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods; whether his inability arises from the annihilation, or from any other insuperable obstacle. In the case before us, the jury have found that the hides were so far damaged by a peril of the sea that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced, a total destruction of them before their arrival at their port of destination became as inevitable as if they had been cast into the sea, or con-

sumed by fire. It appears to us, therefore, that this was not the case of what has been called a *constructive total loss*, but an absolute total loss of the goods: they could never arrive; and at the same moment when the intelligence of the loss arrived, all speculation was at an end."

Here then is the case, put in its strongest form, of goods sold at a port short of their destination. Perhaps no objection would be taken to this argument in applying it even to goods declared "free of Particular Average,"—and by that is really meant, free from loss by deterioration in quantity and quality by sea perils, and subject to the risk of total loss only,—if it could be absolutely shown that the goods would never arrive at their destination in the form under which they were shipped, but would at the end of the voyage exist only as dung or a nuisance, or have disappeared altogether. But to predict this of goods with certainty appears to be beyond the power of any surveyors: so that the theory could scarcely ever be applied to an actual case. And then if the circumstance of the assured's impotence to interfere be allowed as a cause of throwing the responsibility on the underwriters, there can be shown to be a variety of other cases where an assured has no option or control in proceedings affecting his interests, and yet that circumstance does not conclude his underwriters, but they claim to have the question decided upon its true nature and merits.

If we look at the argument in a less strict light it amounts to this;—that there are cases where it is advisable to sell damaged goods at an intermediate port: and that, on the supposition that the goods are so much

damaged that they are on their way to entire destruction, it is certainly an expedient measure to sell them whilst something of them remains, and thus rescue part of their value which is diminishing every hour.* It is the case, therefore, not of an *absolute total loss*, nor of a *constructive total loss*; but of a *possible and probable total loss*; and that checked at such a time as to convert it into a *loss with salvage*. This is to remove it from the warranty of "free from Particular Average," or "free from Average under three or five per cent." A whole cargo of corn would in this way become a claim on a policy, (although that article is free from Particular Average), if every grain of it were sold at an intermediate port, and for the reasons just given. But nothing less than the sale of the whole interest in corn would suffice. Anomalous as are some of the shapes in which total loss makes its appearance, it has not gone the length of being asserted that there can be a total loss of an entire cargo when some of that cargo is delivered sound at its place of destination. With goods in bulk, a loss must be of the entire quantity. Up to a period previously mentioned the sale of a *portion* of a cargo of corn at an intermediate port was allowed to be claimed on the policy, but after that time it was decided that there can be no division of goods in bulk insured free from Average. See *ante*.

In the case of goods subject to Average above the prescribed per-centage, the practice is simpler; because the limit required is most likely to be passed where goods are sold at an intermediate port on account of damage,

* With a cargo of ice, for example, delay in an intermediate port might be tantamount to entire destruction.

and consequently the question does not arise. Yet in theory, it seems almost more difficult to reconcile the principle with the reasoning given above. Indeed, when manufactures and other merchandize of a permanent nature are declared free from Average, it is very hard to see the ground upon which that warranty is to be defeated by a voluntary sale at an intermediate port. For it must be borne in mind that when an underwriter insures goods "free from Particular Average," he does so at a lower premium than that which he receives for an insurance against all risks, because it is understood that damage to the thing itself which he insures is excluded from his risk, and that his undertaking is really against Total Loss and General Average only. It seems like a mere evasion to say, that sea-water damage in London is not at his risk, but sea-water damage at any port on the way to London is at his risk : and that the dictum of a foreign merchant or agent (perhaps interested in having the goods sold at the place where he lives), or the voluntary act of the master of the vessel, can change the specific nature of a thing, and convert that into a loss which, without that dictum or that act of volition, would not have been a loss but only an Average for which the underwriters were not responsible under their contract. It is unlikely to be commonly the case, although it may sometimes happen, that packages of manufactured goods, for instance, being damaged by sea-water, are in danger of undergoing such a still-increasing amount of depreciation that before they could reach their intended port of delivery they would have lost all value and even their species. Yet this is the implied reason for their sale short of their destination ; and this is the probable con-

tingency that would change the nature of Particular Average into Salvage Loss.

However, the case stands thus: The surveyors on goods at a ship's port of distress ascertain that certain packages are sea-damaged, and they recommend that they should be sold there. The notification of the intended sale has frequently added to it the expression, "for the benefit of the underwriters." These words are probably inserted as a sort of notice of abandonment, and to make a claim on the insurers more complete; but their effect is mischievous, and very often they are supposed by purchasers to mean that this is a privileged sale where that vague personality "the underwriters" being concerned, buyers may obtain goods at what prices they like to offer. In adjusting a claim on the policy the insured value of the damaged goods is taken, and the proceeds of sale are deducted from it, all charges and commissions having first been subtracted from the produce of the sale. The net proceeds are accounted for to the merchant. Theoretically they are given direct to the underwriters, and these pay the whole value of the goods, as insured, to the merchant; but in every-day practice the underwriters pay over the balance to the merchant, he having received the proceeds of sale. The only difficulty likely to arise is in case the net proceeds should be lost and never reach the merchant, for he would then have greater difficulty in showing that the charge and remittance of them were at the risk of the underwriter; against which position it might be attempted to prove that it was a recognized custom for the merchant to take the proceeds in part payment, and in doing so he accepted the risk of realizing them.

When manufactured goods are sold for damage at an intermediate port, warranted free from Particular Average in the policy, it requires a strong demonstration to show, in order to establish a claim against underwriters, that their value would be *nil* on arrival at destination.

As to Deduction of Freight from Proceeds.

One of the most important questions about a Salvage Loss of goods relates to the freight. It must be premised that the English law does not recognize distance, or *pro ratâ*, freight. It is allowed in most foreign countries, and its prevalence would lead to the supposition that it is found a convenient arrangement. But the English law, looking to the mutual contract of the Bill of Lading, sees an absolute promise given on the shipowner's part under the master's signature, that the goods shall be conveyed to their port of destination (the act of God, &c., not preventing), and an implied promise on the other side, that upon true delivery there, the freight agreed upon in the bill of lading or by the charter-party shall be paid by the merchant who receives them. Here is a contract complete in itself, and one that is not separable. If the goods are delivered in good order the freight is to be paid. If they are not delivered no freight is due. It is the greatest practical guarantee for the completion of the proposed voyage and the safe delivery of the goods. But suppose that it is impossible to carry forward the damaged goods from the port where the ship has been obliged to put into to their destination. Suppose, as in the case of some perishable commodities, it is unlikely they will ever reach their destination *in specie*, in their original and proper form of goods. Then it is useless for the captain

to carry them on, for when they arrive, the merchant will not recognize them, will not receive them, and so no freight will be gained. Or suppose that they are dissolving away, as salt will dissolve, and that it is probable that when the ship arrives she may be quite empty. What is to be done about freight at that intermediate port? The freight is quite as much lost to the ship as the goods are to their owners. They are lost in exactly the same sense—viz., in the certainty that if the voyage be continued they *will be* lost. Is the captain to adopt the proceeds of sale for a payment of freight, *pro tanto*, supposing them not to produce sufficient to discharge the whole; or, is he to secure his whole freight when the proceeds are more than sufficient? or, is he to lose his freight by non-delivery at the appointed place as covenanted by the bill of lading?

Until some years ago the ship's claim for freight was paramount, and it was deducted from the net proceeds of goods sold. The underwriters on freight or the ship-owner thus escaped free from loss, whilst the underwriters on cargo, or the proprietors of it, had the sales of their goods diminished or entirely consumed by the deduction of freight,—although the voyage had never been completed. This was evidently wrong and inconsistent. If it were absolutely necessary to sell goods at once at that intermediate port in order to save something from a progressive destruction, the owner had no right to his freight, because it never could have been earned. It was irrecoverably gone, the contract could never be completed; and the sale was for the benefit of the persons interested in the goods themselves, because by a sale something might be saved out of the wreck of the property.

There was a better argument, however, in favour of the shipowner in cases where there was no fear of the entire destruction of the damaged goods by continuing the voyage. There was an argument in his favour in all cases where it was probable that the goods could be delivered at least *in specie*;—for if so, the freight would be earned. In these cases, then, the captain's allowing the damaged goods to be sold upon the recommendation of surveyors was a voluntary act, done in consideration to the goods—not to benefit the shipowner: for he, so long as the goods could be delivered at their destination, as goods, would receive his freight; and a permission to let them be sold at any intermediate port was to give up his lien upon them,—was himself to defeat a contract which it was to his advantage to fulfil.

It was upon this ground that it became customary in case of sale of goods at an intermediate port for the shipowner to take his freight in full from the proceeds, where that was possible. We can readily fancy cases where it would be more profitable to sell manufactured and other goods damaged, at once, than to wait till a progressive damage had greatly diminished their value, which would be the case by the time they arrived at their port of destination, although there might be no expectation of their entire destruction so as to prevent their being delivered *in specie*. Therefore, when damaged goods were sold under recommendation of the proper persons to consult in such matters, permission was asked, or implied to have been asked, of the captain that they might be sold: and a proviso was made on behalf of the owners, or implied to have been made, that if the permission were granted, the giving up of the goods there was to be taken to be a

delivery in terms of the bill of lading, *quasi* at the place of delivery therein named.

The circumstance which raised a discussion on the subject, and altered the practice, was the disproportion which the freight bore to the value of certain goods : so that if goods were only slightly damaged, and were recommended to be sold by competent persons at an intermediate port, that slight damage was frequently turned into a loss against the underwriters either almost or absolutely total, by the deduction of the freight.

The underwriters who first demurred were some India insurance offices : the subject-matter of the insurance being rice shipped from India for Europe. The vessels put into Mauritius, where the rice was sold damaged ; and the freight being deducted from the sales, only some small proceeds in some cases, and no proceeds at all in others were left. The offices resisted the deduction of freight from the proceeds. They argued that on perishable goods the freight is as much at risk as the goods themselves, for it is contained in them. If it were sugar, and half the cargo actually dissolved, half the freight would disappear simultaneously. And the abstraction of quantity was only a more tangible and apparent parallel to the abstraction of value. The freight sympathizes with the goods which are the mother of it ; and therefore when there is a loss on goods by sale at an intermediate port, a loss on the freight is established at the same time and should be claimable on the freight policy, if it be insured.

And such has now become the settled practice. The exceptions to it are when a foreign ship bound on a foreign voyage puts into a foreign port, and then under

the sanction and authority of proper persons the question of freight is settled on the spot, either by deducting the whole freight, or freight *pro rata*, from the proceeds before paying them over to the proprietors of the goods sold. Such arrangements are generally found to be irrevocable; there is no remedy, and the underwriters on goods must submit to them.

Nor can it be pretended that the English practice is always quite satisfactory. It has the defect of all unvarying rules of not meeting exceptional cases. Sometimes damaged goods sold at an intermediate port by recommendation of surveyors produce such high prices, owing to a scarcity of that kind of merchandise, that the merchant obtains a good though an accidental market; and the result of the sale may even be better for him (freight not being deducted) than if the goods had reached their proper destination. Under such circumstances a shipowner thinks it hard that he should be deprived of all freight on the goods sold; and where the shipowner or his agent or the captain can communicate with the merchant before permitting the sale, the latter, who may see the desirableness of the damaged goods being sold, sometimes makes an arrangement by which a portion of the freight, or the whole, is paid to the ship. Many amicable arrangements are competent even upon documents like the bill-of-lading, though in its legal aspect it knows no other course than the payment of full freight upon the true delivery of the goods described in it.

And here it should be noticed that a change of view about freight has latterly been perceptible. Like the gradual difference in the modes of thought affecting other subjects which slowly develops itself, the justice and

expediency in some cases of dividing freight force themselves into prominence, in spite of all that has been pronounced on the integrity of the affreightment contract. Some legal persons already maintain that English law recognises *pro ratâ* freight. If this doctrine becomes generally supported by law, the English system and that of foreigners will be in greater harmony.

A late case of importance occurred in the Admiralty Court,* in which the late Judge Lushington announced very distinctly principles which will strike many persons as new,—at least in such categorical expression. Dr. (afterwards Sir J.) Lushington pronounced,—

1. That when a vessel at an intermediate port is not worth repairing, if the master does not *abandon his voyage*, he has a possessory lien on the cargo for freight. It is competent to him to abandon his ship without abandoning the voyage, if his decision is made within reasonable time as to whether he will tranship the cargo, and so earn his freight.

2. The *whole* freight is payable if, by default of the owner of cargo, the captain is prevented from forwarding the cargo to its destination. (The *Galam's* case was cited.)†

3. No freight is payable to the ship if the owner of cargo is, *against his will*, obliged to take the cargo at an intermediate port.

4. To justify a claim for *pro ratâ* freight there must be a voluntary acceptance of the goods by their owner at an intermediate port, in such a mode as to raise a fair inference that the farther carriage of the goods was

* *The Soblomstein* ; Ad. : December, 1866. L. R. 1 A. & E. 293.

† Br. & L. 167.

intentionally dispensed with. (*Vliërboom v. Chapman* was referred to.)*

The case of *Pirie v. The Middle Dock Co.*† was much considered and discussed. The ship laden with coals and bound for Singapore, was found to have her cargo on fire. A small portion of coals was thrown overboard; the vessel was got to a port in Java, when water was thrown down the hatches, and the fire which was very extensive, was successfully extinguished. It was discharged, and the rest of the voyage was abandoned. The distance from Batavia to Singapore, the vessel's port of destination, is only a few hundred miles. The market at Batavia was a favourable one for coals, and reduced though they were in value and in quantity, they realized a sum considerably over their invoice cost. The accident appears to have led the cargo to a market as good as that to which it was destined. As to the cause of the accident, the fire originated in the coals themselves.

Was the shipowner, under such circumstances, to be the only sufferer? Was he to receive no freight for carrying a cargo from England to Java; in fact, to a market quite as profitable as that of Singapore? Had he discharged the coals at the latter place, freight would have been deducted from their proceeds. At Batavia without such deduction, a cargo injured by fire and water left a profit to the shipper of some hundreds of pounds. These reasons, however, were not those on which the judgment rested in giving the ship-owner a portion of the freight. What was allowed was in the way of

* 13 M. & W. 238.

† Q. B. Div.: W. Williams, J., 4th April, 1881. Shorthand writer's notes.

General Average contribution for freight lost, as on that part of the cargo not actually in ignition. The merchant could not claim to bring any loss of coals into contribution; for first, there was shown to be no loss on the coals; and secondly, it was the *vice propre*, the spontaneous combustion of the cargo, which was the cause of the misfortune. No such fault could be attributed to freight. Being innocent, a part of the freight was recoverable in General Average.

OF PARTICULAR AVERAGE ON GOODS.

Particular Average consists of claims for damage to merchandise by sea-perils which are ascertained at the port of destination. This distinguishes them from those salvage losses of which we have just been speaking, which take place at some intermediate port, and are settled by deducting the net proceeds from the insured value. Particular Average is adjusted in a different manner, and is a more delicate test of the quantity of sea-damage which exists in the goods on their arrival at the place where they were intended to be sold.

And, first, it will be well to get rid of the notion that the best and simplest plan to settle an Average on goods is to deduct the proceeds from the insured value. It can be shown that this method of claiming for damage will rarely be correct; for by it if goods come to a rising market they may sell so well, so much higher than it was expected they would, that though they were really heavily damaged, a small claim only, or none at all, will result: whilst, as the converse of this, goods arriving at their destination to a depressed and falling market, though

really damaged ever so little, may establish a claim of fifty per cent., or upwards, on the policy. Now this is clearly a wrong and unintended state of things. It is involving underwriters in the fluctuation of markets,—a risk they never take upon themselves; the object of the insurance they grant being against sea-perils only. A sudden rise in the price of an article arrived in London, though much damaged by sea-water, might show no loss, owing to the rise of price at which it sold; the appreciation in value concealing and neutralizing the actual damage sustained; and thus the merchant would have no claim on his underwriters in the face of the known loss which his goods has sustained. The opposite case to this can readily be imagined. The smallest depreciation in quality, merely sufficient to give a pretext for making a claim on the underwriters at all, would cast upon them all the effects of an unsuccessful speculation—a state of things never contemplated in the system of insurance. These contingencies and these erroneous results are avoided by applying the principles of Particular Average to claims for damage to goods. When once understood the theory is perceived to be just and consistent in itself. It is this. *Price* is resorted to only as a *measure of deterioration*. The loss or damage sustained by the goods resolves itself in the eyes of purchasers into a difference in monetary value. In perishable commodities the loss of weight and quantity is ascertained in an independent manner, in general, viz., by a comparison of invoice weights with sale weights, or by separating the sound packages and finding their mean or average weight, &c.; and then having calculated what the damaged packages should have weighed, comparing

it with the actual weight rendered by the damaged packages, by which process the loss, as far as weight is concerned, is discoverable. The depreciation in quality or condition must be found by testing the price which can be obtained for the goods in their damaged and imperfect condition with what other goods of similar original quality produced, or by the price which skilled persons, such as brokers and merchants, state they would have realized if sound.

In making this comparison the points to be particularly cared for are, that the two values between which it is instituted be taken in the same place, and taken at the same time. If this principle be deviated from the comparison will be made between *unlikes*, and no true result will be attainable. It would again involve the fluctuation and local differences of markets. If, therefore, the sound price be certified by a broker or merchant, it must be the price of the day on which the damaged is sold, and in the same market. And if the sound price be ascertained by observation of actual sales of sound in the same place and on the same day with the damaged, regard must be had that the *quality* is the same in both cases, and that the conditions of each sale as to discount or credit are similar.

Thus, it is not allowable where sea-damage exists in part of a cargo, the whole of which had been previously "sold to arrive," to assume the *agreed price* for sound value, and the *actual sale* of the damaged goods after the ship's arrival for their worth in their depreciated condition; a valuation must be given of their price on the day on which the damaged goods were sold, and the contract price must be put aside.

In many places damaged goods are sold by auction, and sales by auction are very generally made for cash ; whilst sound sales and estimates of sound price are nearly always at a credit. Again, therefore, to prevent a comparison of dissimilars, reference must be had to the value of money ; and both prices must be put on the same footing—both must be either for credit, or for cash.

The foregoing points being kept in view, it will follow that it is a matter of no moment whether markets be high or low when the damaged goods are sold. If they be high, there will be a greater price gained for the damaged as well as for the sound. If they be low, both sound and damaged will feel the same influence and will maintain the same proportion to one another ; the difference between the two, whether high or low, being the measure of the damage the goods have received.

It may be added, that although theoretically it is quite true that fluctuations in markets are of no consequence, because we are only regulating *difference* in price,—practically, it makes a great difference to the underwriter whether the market be buoyant or depressed. On a brisk and upward market damaged goods always sell nearer to the sound price than they do on a dull and sinking one. Competition, conveniently small lots, &c., often cause the damaged goods to sell at a price nearly approaching, or even quite equivalent to, that of the sound. It is very different with a falling market,—a market sick with an over-supply of that description of goods which has been damaged. Buyers scarcely caring to purchase the sound lots will hardly look at the damaged, and the distance between the two prices becomes greater. This is, how-

ever, only a practical inconvenience ; it does not impugn the general principle.

When the relative difference between sound and damaged is ascertained—the difference involving both quantity and quality—it is next to be applied to the sum insured. It is not the actual amount of difference between sound and damaged that the underwriters are necessarily liable for, but the *proportion* or ratio, applied to the value insured. So that supposing £80 be insured on a package of goods, the sound value of which proves to be £100, and which sells in its damaged condition for £80, the actual difference is £20, or twenty per cent. loss. But the underwriters have not received premium on £100, but on £80 only, the sum at which the package was mutually agreed to be valued in the policy. They cannot, therefore, be made to pay the whole £20, but they will pay twenty per cent. of the amount they have insured, viz., £80, which is equal to £16. And conversely, if the goods be insured for £80 : their sound market price be £60, their sale £40 ; the actual difference is £20, or $33\frac{1}{3}$ per cent. The underwriters having insured more than the actual value, are liable for the ascertained proportion of damage, and must pay $33\frac{1}{3}$ per cent. of £80, or a sum of £26 13s. 4d.

Generally speaking, the insured value is less than the sound value ; and for a reason which will be understood by observing in what manner the two values are composed. A shipper of goods has usually the object in view when insuring, of securing or covering himself for the cost of what he has at risk, including often his expected profit : and inasmuch as insurance is an expensive advantage, he does not needlessly wish to throw

away money by paying premium on a sum greatly exceeding what is required to make him secure. For, as safe arrivals immensely exceed losses in number, he, by insuring an excessive value on his shipments, would in the long run lose more by the unnecessary premiums paid, than what he has gained in claims for loss and Average by high valuation. What a shipper properly and prudently insures is, 1—the invoice cost of the goods : 2—all charges incurred till the goods are on board the ship : 3—a reasonable percentage of expected profit,—perhaps ten per cent. : and 4—the premium of insurance itself, together with commission for recovery in case of loss. It is not meant that every shipper goes methodically through this process of synthesis, for he probably puts on a value by guess which includes all the above, but it shows to what extent a prudent shipper may and should insure. If freight be payable at the port of shipment whether the goods arrive at their destination or are lost, that also becomes one of the charges to be added to the invoice, numbered 2 in the above list. It is, however, competent in the shipper to insure the advanced freight separately from the goods ; and with some articles, *ex gra.* coals and wood, this is frequently done : and it has some practical convenience in the adjustment of General Average.

If it is the receiver of goods who insures, he insures a sum either based upon the invoice with the addition of profit, &c., or based on the net price of the commodity prevailing in the market where his expected shipment is to arrive. But in either of these cases, neither the shipper nor the receiver of goods, in general, considers it necessary to throw away premium by insuring charges

which are uncertain and conditional on the safe arrival of the goods. Freight paid on delivery, and duty, cannot be demanded if the vessel be lost, therefore the assured is unconcerned about them,—they are not his risk. And so with any other particular charges which would be paid on goods that arrive safely. If the goods do not arrive, the charges will have no existence.

Thus we see of what the insured value is composed. And now let it be asked what it is that makes up the market value, or sound price. First, there is the value of the commodity itself, enhanced, we may presume, by its transport to a place of consumption: 2—there are included in the selling price or market value the various charges of landing, &c., to which goods are subject before they can be delivered to consumers: 3—there is the freight, paid on delivery of the goods by the ship: 4—there are the import duty, municipal dues, &c.: 5—there are the brokerage and merchant's commission: and lastly, there is the cost of insurance. It is plain that unless the selling price includes all the above, there will be a loss on the shipment.

Observe the action of this. The goods on which a claim is about to be made have these charges included both in their sound value and in their actual selling price. But, with the exception of profit, they are not included in the insured value, so that as a general rule the sound value will be higher than the value insured. Not always, indeed, because fluctuations in markets will sometimes leave the value insured higher than the market value, in spite of the additional charges and expenses, but, in general, it will be the contrary. Let us, then, suppose the following case:—Insured value of

goods, including all charges, imaginary profit, and cost of insurance, to be £100—

Sound value in the market the same	£100
Increased by freight	10
Ditto by duty	35
Ditto by other charges	5
	<hr/>
Making together	£150

That being the price at which the goods are quoted in the market, but which when analysed is seen to consist of the ingredients given above.

The analysis of the selling price, or damaged value, will be—

Value as above	£100
Less depreciation in quality, say one-fifth	20
	<hr/>
	£80
Increased by freight	10
Ditto by duty	35
Ditto by other charges	5
	<hr/>
	£130

The loss on the sound value is thus, £20, or $13\frac{1}{3}$ per cent. But only £100 has been insured; which being deteriorated in like proportion will give £13 6s. 8d. for the claim of Particular Average against the underwriters, instead of £20 the actual sum lost.

It may be objected by some persons, as it very frequently is objected, that by this process the merchant loses on the transaction; that he only makes a partial recovery of his loss upon his policy. And it is often demanded, why the assured should not without circumambulation first deduct the net produce of the sales from the sum insured, and claim the difference from the

underwriter: or, in case any law or custom prevents this short method being adopted, why the basis of the claim should not be the net value of the goods at their places of destination and sale; *i.e.* the price stripped of duties, freight and charges, for that would approximate to the sum insured, and there would then be little or no difference between the amount of actual loss and the amount of recovery from the underwriters.

As to the first of these two questions, it has already been answered to a considerable extent by showing, above, that the process of deducting the net proceeds, and which is called partial loss, involves the underwriter in the risk of rising and falling markets,—a risk he did not take upon himself when he underwrote the policy. On a falling market it would be manifestly to the advantage of the merchant to have this method adopted, supposing the goods to be insured at the mean or average price prevailing at the place of sale; and it was stated that on a very gaining market there might be a very considerable loss on the goods, both in quantity and quality, and yet the merchant might recover nothing by reason of the rise in price of the goods at the time they were sold. But in a less extreme case it is clear, by thus virtually giving over the goods to the underwriter for better or for worse, that whilst the underwriter in some cases would be subjected to a loss in price in the thing itself dependent on a fall of the market, in the contrary state of the market the merchant would have given away his profit to the underwriter.

An example will make this plain.

Suppose the insured value to be £100,—that being also the true average value of the goods in the market:—

Ordinarily they would have produced the mean net value of	£100 0
They have actually lost in quantity one-fourth, or 25 per cent.	25 0
	<hr/> £75 0
There is a rise in price at the time of 15 per cent.	11 5
	<hr/>
The goods actually produce in the market the net sum of	£86 5
	<hr/>
Insured value	£100 0
Deduct net proceeds	86 5
	<hr/>
Recovery from the underwriters	£13 15

instead of £25, which it could be demonstrated the goods had really lost in quantity alone. So that the profit the merchants would have made on this part of the shipment has been given away to the underwriters.

But we are not left either to conjecture, or to simple custom, in dealing with such settlements. The law has laid down a rule which decides that the other method—that of Particular Average—is the one which is to be adopted in all such cases. It is now about eighty years since the cause of *Lewis v. Rucker* * was tried by Lord Mansfield which settled authoritatively the principle, that a claim for damage on goods arrived at their place of destination must be made by a comparison of their sound and damaged values; and that what an underwriter is responsible for under his policy of insurance is the deterioration of the commodity by sea-damage, but he is not to be subjected to the fluctuation of the market.

This principle has been consistently acted upon since that time. Like most other rules this one has exceptions, but they rarely occur. When they take place it

* 2 Burr. 1171.

is from the impossibility of ascertaining what the real value would have been in the ordinary course. With goods unpacked and examined at a port where there is no market, and which only lies in the way to the place where the goods are destined to be manufactured, and they are sold at that port of transit on account of damage, it sometimes becomes necessary to treat the loss upon the salvage principle. This is really because one of the needful data cannot be supplied. Any estimate of sound value would be mere surmise in a place where there is no opportunity of using an article made for a special purpose and to be employed in a particular place. On the other hand, the principle of making the claim as a salvage loss could not be adopted as a matter of right, because it is probably possible to send forward the damaged goods to their destination, like the sound, were it expedient: but experience may have shown that a sale is preferable at the port of transit rather than at the place of manufacture, where, possibly, there are no buyers at all, and where the raw material once damaged is useless for the purpose for which it was intended.

Again, there are some objects shipped which are valueless if one of the set of packages is lost or absent. Thus an organ would have no assignable value if one or two packages containing pipes or mechanism were lost or sold. So, too, an iron verandah which was sent out to the West Indies for the purpose of surrounding a house, was damaged by sea-water to the extent of the contents of one or two packages; the rest, being all connected with these, had no value in themselves, dissociated from the packages damaged. This would be necessarily

claimed as a salvage loss ; especially if the verandah had been made expressly for a particular house or purpose, unless time and opportunity allowed of the deficient portions being re-supplied from the place of original production.

Where the difficulty of establishing a sound value is anticipated when the policy is effected, it is a safer plan, and one occasionally adopted, to insert a condition, "in case of damage, the claim to be settled on the salvage principle." Thus the door is shut against dispute.

Gross and Net Proceeds.

The second question to be answered is,—it being established in what form a claim for damage on goods is to be made,—Why should not the *net* proceeds be taken against a *net* sound value in fixing the quantum of that damage ? We shall see that this is a pertinent inquiry and not very easily answered if we seek only grounds of reason and consistency. We shall also see that though a comparison of gross proceeds has been settled by law to be the proper method and is very generally acted upon, yet in certain cases the application of the legal rule has produced an absurdity in its consequences, and has been obliged in practice to be set aside ; seeing that by it a distinct loss to a large extent might notoriously exist on some species of merchandise, and at the same time by the addition of duties, &c., a claim on the underwriters for the loss might be effectually prevented.

The cause which decided the *gross* proceeds to be the proper basis for adjusting a claim for Particular Average was that of *Johnson v. Shedden*,* and is often referred to

* 2 East, 581.

as "the Brimstone Case," that being the subject-matter of the insurance. It was tried before Justice Lawrence; and in the year 1802, when a similar question was being litigated, the Court stated its approval of that decision.

The principle laid down in it was this: that underwriters are not to be liable for any loss which may be the consequence of the duties or charges to be paid after the arrival of the commodity at the place of its destination.

The Court held that the calculation was to be made on the difference between the respective *Gross Proceeds* of the same goods when sound and when damaged, and not on the net proceeds.

Mr. Justice Lawrence began his judgment by declaring that the loss on damaged goods is to be estimated by the rule laid down in *Lewis v. Rucker*,* that the underwriter is not to be subjected to the fluctuation of the market; (that is, that the loss is not to be stated on the salvage principle; nor by comparing the net proceeds of the actual sales of the damaged goods with the "price to arrive," *i.e.* on the bargain made as to price before the goods arrived;) that the loss for which alone he is responsible is the deterioration of the commodity by sea-damage; and that he is not liable for any loss which may be the consequence of duties or charges to be paid after the arrival of the commodity at the place of its destination. The parties agreed that the damage was to be ascertained by considering whether the commodity was a third, a fourth, or a fifth worse: and it was also agreed that that could only be done by the price at the port of delivery. The only question, therefore, was,

* 2 Burr. 1171.

whether that price was to be ascertained by the net proceeds or by the gross produce. *The Court held that the calculation was to be made on the difference between the respective gross proceeds of the same goods when sound and when damaged, and not on the net proceeds.* The main stress of the argument in favour of the judgment is this, that by taking the net proceeds as the basis, instead of the gross, it will happen that when equal charges are to be paid on the sound and damaged commodity the underwriter will be affected by the fluctuation of the market, which ought not to be. It would be more correct to say that the underwriter would be affected by the operation of the fiscal regulations of the country where the goods were sold; and that *this* ought not to be.

This then settled the law upon the subject;* and to underwriters it is of particular importance that it should be maintained, as the inclusion of duties, freight, and charges is much in their favour. It makes the merchant divide the loss, in general, with them; because, as it has before been shown, it is not for the merchant to insure freight and duties paid on arrival,—since that implies that they are not payable if the goods do not arrive, and therefore are not at his risk. Besides, he has no legal right to insure the freight, which is the insurable interest of the shipowner. Then the value insured may be considered to be thus: Cost of goods, + charges till shipped, and cost of insurance, + expected profit. And the saleable value in the market on arrival may be taken

* In some policies the condition is specially introduced, that in claims for Particular Average they shall be stated on the net proceeds. We may add, that any arrangement or variation from ordinary terms may be made by special contract.

to be, the foregoing cost, charges and expected profit, + freight, + duties and charges at the place of destination. So that generally speaking the sound value will stand higher than the insured value ; and any loss on a sale will, to the extent of the difference between those two values, have a proportion thrown off, which the merchant must bear.

The subject of gross or net proceeds has, in spite of this unreversed decision, remained a vexed question ever since. Each new generation of merchants coming to effect insurances stumbles at the same difficulty, and asks for a solution of it in nearly the same words. It will be useful, then, to endeavour to sift the matter thoroughly, and try to come to some conclusion about it. The misunderstanding arises mainly from persons approaching the question from two opposite sides and, consequently, viewing it in two different lights. The special point at which we should seek to arrive, and which being apprehended would go far to decide the contention, is this,—whether a particular loss in the value of damaged goods is an actual loss of part of the thing itself independent of duties and charges, which are to be considered external and accidental ; or, whether that loss is a conditioned one, dependent in amount on those duties and charges, enlarging or diminishing with the addition or subtraction of them. The assured invariably assumes the former to be the case, that is, the *reality* of the loss on the goods ;—whilst the law seems to have assumed the latter position, viz., the *unreality* of the loss, or its *conditional quantum*.

We will, therefore, take these two assumptions separately. And first we will put the case in a common

formula. Suppose, as above, the invoice cost, + charges + expected profit on certain goods, to be valued in the policy at £100. Let the sound value of these goods in the market to which they are sent, viz., the long or gross price, including freight, duty and charges, be £150. Let the gross proceeds of them in a damaged state be £100. The loss will therefore be £50. Consequently, if £150 have a loss of £50, £100 insured will have a loss of £33 6s. 8d., which the underwriters will pay ; and the merchant has to bear the difference, viz., £16 13s. 4d.

The merchant argues in this manner ;—I am thus subjected to the arbitrary addition of freight, duty, &c., to the value ; the only effect of which is to deprive me of part of the sum I should have to recover on the policy. For the £50 deficiency is the actual deficit in the nature of the thing itself, and is the exact equivalent to what the goods have lost in quality by sea-damage. Had these goods been sold in bond and with freight and charges deducted the same quantum of loss would have been shown on them, since that loss is actual and real. In this case the short, or net, sound value would have been £100 and the net sales £50. The loss, therefore, still would be £50. And as the sound and insured values would have coincided, I should have recovered my loss in full. I am not necessarily involved in freight and duties. The true increase of value by change of place I have provided for in the profit I included in my insurance, and which the result of the sale justifies. If really there be a loss on freight let it be claimed on the shipowner's freight policy, but do not let it interfere with my goods, since it

shows an untrue and imaginary value, a value which never enters my pocket, and the action of which is detrimental to me. And in regard to the duty, the underwriters always assert that they are unconcerned in duty altogether, are not to be affected by it. Let it be so: discard it from the price; and let us deal with what we are concerned, viz., the value of the thing itself. We should remark that in speaking here of duties we refer to fixed or specific duties. The addition of *ad valorem* duties on sound and damaged goods does not affect results at all.

To make this clearer, let us suppose that the goods consisted of saltpetre, and that the damage had the effect of reducing the quantity but not the quality of the goods. Suppose that 50 per cent., one half, of the saltpetre were washed away. Could any addition or subtraction of duty or charges alter that fact? Would it be right by any legerdemain of duties, &c., to make it appear that though it were certain half my saltpetre was washed out, only thirty-three per cent. was to be paid on the policy?

Let us take another case; one in which the freight has been paid at the shipping port, and the port of destination is one where it is customary to sell the goods in bond. Their sound value is £100. They sell for £50. The loss is £50. The price given by the buyers indicates the true quantum of damage, for they would not give more than the goods were worth. Let the insured value be, as before, £100.

Now if this case is to be subjected to the arbitrary addition of duty in stating the Average, the damage which was fixed without mistake at 50 per cent. will be

reduced proportionably to 40 or any percentage according to the duty added. So that afterwards, when the insured value is applied, £40 or some smaller sum will be only recovered, although £50 was the sum really lost by sea-damage.

Sometimes principles are only recognized when they are seen in an exaggerated condition, when the case is reduced to an absurdity. They are acknowledged then; but still are not always thereafter acted upon, because their very distortion to the extreme limit prevents their being identified with more moderate instances, which are, nevertheless, the same in nature, and only differ in degree.

There are, accordingly, some exceptional cases in which the legal rule has had to be broken through, and has been customarily discarded. This remark applies especially to tobacco and tea. The duty on the former article is sometimes as much as 700 per cent. of its price in bond; on the latter it was formerly often between 200 and 300 per cent., but in consequence of the reduction of the tea duty, the disproportion is not so great now. The injustice became too grossly apparent of letting duty come between the suffering merchant and his insurers, and thus putting him out of a claim for damage sustained. When the bonded price of tobacco is 4*d.* per lb., and owing to sea-damage it only produces 3*d.* per lb., it is perfectly obvious that there is a loss sustained on the thing itself of 1*d.* per lb., or twenty-five per cent. of its value. And the value insured is generally about the same price. Now if to this net price of 4*d.* per lb. we were obliged to add the duty of, say, 700 per cent., or 2*s.* 4*d.*, we should have a sound value of 2*s.* 8*d.* per lb.

And the damaged value being 3*d.* per lb., and duty 2*s.* 4*d.*, gives 2*s.* 7*d.* per lb., there will still remain an absolute loss of 1*d.* per lb., but which instead of being twenty-five per cent. in ratio is now reduced to the proportion of $3\frac{125}{1000}$ per cent. And suppose the hogshead to be insured for £20, instead of the loss being £5, it would be reduced to 12*s.* 6*d.*, and would only be claimable in rare instances; and as tobacco is warranted in policies free from Average under five per cent., in the instance cited there would be no claim at all.

By tacit convention the bonded price of tobacco was long ago conceded, and so also was that of tea. On the latter article the duty being now only sixpence per lb., the disparity in value is not so striking as it was, but the practice of adjusting on the bonded price continues.

Then we ask, is there anything exceptional in the nature of these two cases that takes them out of the rule, or is it that they really demonstrate the justice of all similar cases, however results may differ in degree? The merchant, who is still supposed to be speaking, will decide without hesitation that the principle of assuming the net proceeds can only be the true one, since by the opposite course he is deprived of part of that loss to protect himself against the whole of which was his object in insuring.

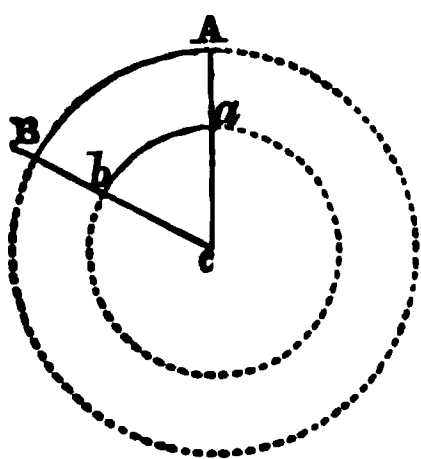
Now we have to hear the other side; and we are to suppose the arguist to be an underwriter. First, he urges, we have the law on our side; for it says that the calculation of the Average shall be made upon the *gross proceeds* of sound and damaged goods, and not *net* proceeds. We will leave out of sight the argument

there used about the non-interference of duties and charges, because it unfortunately tells against the conclusion; and an umpire might possibly agree in our opponent's view for the reasons our own advocate assigns.

We cannot, perhaps, defend the principle of adding duty to goods which have been sold in bond and the sound value also given in bonded price, or ascertained comparatively from similar sound goods sold,—except on the ground of consistency, to give uniformity to that principle. Our contention relates to goods sold duty-paid, and when the sound value is given in the same way. We are not in this case building up a factitious sound value purposely to out-top the insured value, and thus to cast away part of the loss exhibited on the original smaller value; we are dealing with an actual fact; viz., that on a certain duty-paid and freight-paid price given in the market, there was a certain difference or loss arising primarily from sea-damage. This is established as a proportion or ratio, and is applied to the insured value. If the insured value be less than that value (and it generally is less), a part of the loss will fail to be recoverable from the underwriters; it being the proportion of loss affecting the freight and charges; for they sympathize with the subject-matter with which they are associated; insomuch that the loss appertaining to the duty is, or ought to be, recoverable from the Customs on application and proof: and when there is also a loss of quantity in the goods, the duty on the deficient part is never even levied. It is true that there are such cases, as in Sicily, where the duty is charged on the quantity deficient as well as the quantity arrived; but

this extreme hunger of the Customs is rare and exceptional.

We consider, then, that the larger loss on a larger sum is as much inherent in the surplus over insured value as it is in the amount of value insured. *That*



in dealing with larger sums merchants and brokers make proportionally larger differences than they would on smaller amounts. It is as if the arc of a circle being $a—b$, that arc will become $A—B$ when the radius of the circle is extended from c a to c A .

Thus ; suppose we had the example before us of the same, or similar, goods being sold in bond and *ex* charges ; and again, with duty and charges paid : we assert that something of the following result would be the consequence :

Let the insured value be £100.	Let the bonded or
short sound value be	£100
Let the bonded or short damaged price be	80
	<hr/>
The loss will be	£20

or, one-fifth part.

And when duty and freight are paid, let the sound	
value be	£150
Then we maintain that damaged price would be	120
	<hr/>
And the loss consequently	£30

or, still one-fifth.

Because we see, throughout trade, certain proportions preserved not only in the prices of several qualities *but in the differences themselves between prices.* Thus, for illustration, we see in pepper, worth when sound, 4*d*.

per lb., the first class damaged will probably produce $\frac{1}{4}d.$ less; whilst in Congou tea at $10d.$ per lb., the first class damaged will probably bring $1d.$ less; and in silk at $10s.$ per lb., sound price, the difference for first class damage will be $1s.$ per lb. There being a gradation in the differences made, having a relation to the price itself.

To give, once more, a familiar example. Suppose in buying a pony, £5 were allowed for a defect discovered, a purchaser would not accept an allowance of £5 for the same defect in buying a hunter, but would probably require £20. So that the *difference* a buyer makes between sound and damaged condition in purchasing goods bears itself a relation to the price of the article.

This is perhaps all that can be urged in favour of taking a duty-paid price as the basis for ascertaining the loss claimable from an underwriter.

Excepted Articles.

Though the duty-paid price principle must be considered to be firmly established, there are in practice numerous exceptions to the rule. Tea and tobacco have already been mentioned. Sugar from Havana and Brazil were also favoured till the duty on sugar was abolished. And indeed it may be said that goods which are *invariably* sold in bond, either here or abroad, are to be calculated on the *net* and not the gross price. Where duties are so small as to affect the price in an insignificant degree, it is not of much practical moment whether the duty be included in the price or not. When they are *ad valorem* they have no effect whatever.

Yet on the whole, and after considering what can be urged in favour of adjusting Particular Averages on gross proceeds, it may be thought that the balance both of convenience and equity seems rather to incline to the side of adopting the net prices as the bases of claims. Should this opinion prevail extensively we may hereafter see the famous decision of *Johnson v. Shedden** superseded.

Exchange of Weight.

The next question in reference to claims for damage to goods is in regard to the weight. Some species of merchandise increase in weight by sea-damage; such as cotton and wool. Some kinds, on the other hand, lose weight, as sugar, saltpetre, &c. Some sorts of goods vary in weight according to the weather prevailing at the time of their being landed and afterwards. Silk is such an article; and as it is one also of great value, the difference of a single pound in a bale must be accounted for.

There are several methods for ascertaining the proper sound weight of damaged goods. When the weights run pretty evenly throughout the parcel, the simplest way is to select the sound packages and find the average weight of those damaged, by a comparison. A still more exact method, and one absolutely necessary to be pursued when the packages vary very much in weight, is to select the invoice weights of the sound packages and their landing or sale weights, and thus to establish the exchange or rendiment of the invoice. The invoice weights of the damaged having been also culled out,

* 2 East, 581.

they can be converted into English weight with exactitude.

Credit and Discount.

When there is damage on outward-bound merchandise, the unsound portions are usually ordered by the surveyors, who are frequently English merchants, or by Lloyd's agent, to be sold by public auction : and the condition of a sale is nearly always that the price is to be for cash. But the sound value is generally given at the usual credit of the place ; where it is not, it is so expressed, and is stated to be *for cash*. It is highly necessary that both prices should be placed on the same footing. Both must be for cash or both for credit or must be brought to the same level by the aid of discount, or we are again comparing dissimilars, just as much as if we took the value of the sound at one place or time, and the value of the damaged at another place or time. In London the distinction of cash and credit is seldom made in sound and damaged prices.

Selection of Damage.

In all foreign countries it is highly desirable that proceedings about damaged goods should be conducted under the direction and surveillance of Lloyd's agent, or, if there be not one, of the British consul. Lloyd's agent should witness each stage of the proceedings. He should appoint surveyors whom he knows to be reliable persons and acquainted with the kind of goods which they are to inspect. Where there are trade brokers he will nominate one or more to certify to the sound price of the goods.

An important object of Lloyd's agent's interference is

to prevent a wholesale condemnation of goods. In some places it is customary for the merchants to have whole packages of goods condemned upon a very slight amount of damage. This is often the case with manufactures where there is only a partial damage of the contents, many pieces being sound. It is highly desirable, in justice to the underwriters, that the damaged goods alone should be sold, the sound portion being selected from them. Orders to this effect have been sent and enforced by the Committee for managing the affairs of Lloyd's to all their agents. The plan of selection cannot always, however, be carried out. It sometimes happens that the contents of a package are a set, or assortment, and that the abstraction of part from it leaves the remainder unsaleable, or only saleable at a reduced price, although it be not sea-damaged and may therefore be said to be sound. Again, it is often the case that goods are sent and insured to a certain great town or emporium where the damage, if any exists, is inspected, and the injured goods are sold. Nevertheless the object of the merchant in sending them to that place may be not to make it their ultimate destination, but that they should afterwards make their way into the interior of the country. In this case, if out of 100 pieces of goods contained in a bale, 70 pieces were to be found damaged and 30 pieces sound, the segregation of those sound pieces might embarrass the merchant and entail a considerable loss upon him; for he may be unable to sell them to advantage where he resides, and he cannot send up the relics of a package to the interior without their sustaining a great depreciation.

Whilst, therefore, there is great reason for endeavour-

ing to confine the sale of damaged goods to the actual number of damaged pieces, the nature of things will not always permit this. Underwriters sometimes take very strong determinations upon this point, and throw out part of the claim because the sound portions have not been extracted from the bales. They forget the equitable view that must be taken of *bonâ fide* transactions amongst people of good credit; and that what the insurers do not pay must fall on the assured, the shipper, who has had no more power than themselves to interfere with proceedings taking place thousands of miles away from him, and who has paid the underwriters a premium for a reasonable protection or indemnity. It must not be forgotten that an insurance on manufactures is couched in such words as these, "on packages of goods:" with a proviso in case of damage, "to pay Particular Average on each package." A *package* therefore being damaged may well be looked upon as an integer. It is a *damaged bale or case*, even though not every constituent part of its contents be sea-damaged. It is not specified in the policy that it is to be dealt with by separation, for then the words of the Average clause might as well have run, "to pay Average on each *piece* of goods in a package." All proper precaution is to be used at the place of destination to prevent loss that by any adopted means can be avoided; but if by anything that the agents or consignees can do, a certain loss cannot be escaped even on the pieces not actually touched by water, the policy is not an indemnity to the merchant if it throws on him a loss clearly consequential upon sea-damage. To hold that an underwriter is unconcerned in the depreciation of the five, or fifteen, or thirty pieces undamaged out of a whole package, the

remainder of which is sea-damaged, is nearly as unreasonable as to say that every sound fibre in a bale of hemp or a package of silk is to be selected, and that the loss on those few fibres is to be rejected by the underwriters.

It is also to be considered that no real loss or very little, ought in general to be sustained by selling the sound pieces with the damaged ; because their admixture raises the price of the whole number. And it is not at all a fair method of adjustment where the sales of sound and damaged pieces in a whole bale are inseparably blended, and show a certain percentage of loss on the hundred pieces, common to the whole, to allow the underwriters to deduct from the loss on the bale the percentage of damage on the insured value of the pieces sound. For those sound pieces, even supposing them to have sold at some depreciation themselves, were the redeeming portion of the package, and certainly were not depreciated either in ratio of the damaged pieces or of the common percentage. Yet an underwriter has been known to strongly assert that the sale of sound pieces with the damaged, in a package where both existed, tended rather to *depress* than to *raise* the standard of price for the whole. It might as truly be asserted that boiling water being poured into water of 40 deg. of temperature, the result would be a common temperature of 30 deg.

When, however, the damaged pieces can be selected from the sound without breaking up an assortment or leaving an unavoidable loss on the sound remainder, that course should be taken. But if it cannot be done without loss on the sound remanet, then it is *the assortment or the package which is the unity insured*, and of which the underwriters guarantee the safety.

Prejudice and consequential Damage.

We are next led to consider the more unsettled and difficult question of consequential damage. The loss left on the sound pieces just spoken of is clearly a depreciation consequential on their association with the damaged pieces in the same package. And there are various other ways in which goods are prejudiced in quality and price although not touched themselves by sea-water. The most direct of indirect damage is injury by the vapour or noxious exhalations proceeding from actually damaged goods in a ship's hold. Here, if the quality of the goods themselves, as distinguished from the external package, be reduced, there is no reason why the underwriters should not bear the loss thus produced ; always bearing in mind that although the loss be only a consequential and not a direct one, it is a *real* loss, and unquestionably arises from sea-water as the first cause. The vapour may affect the appearance, and the effluvium injure the flavour, of articles of delicate character.

Underwriters' liability for this species of injury was affirmed in the cause of *Montoya v. London Assurance Company*,* where it was held that if a portion of a cargo is damaged by sea-water, and the vapour from the sea-water or the foetid odour arising from the goods through such sea-damage injures another portion of the cargo above them, whether the same or a different description of goods, the underwriters are liable for the damage as being occasioned by a peril of the sea.

But where the steam or fumes only affect the package

* Exchequer, May, 1851.

and not the contents the question is not so easily disposed of. Tea is the article chiefly concerned, and “stained packages” of tea for a long time created serious discussions between the merchant and underwriter. The process of the damage is as follows: the external package exhibits stains and peeling off of the paper, or other indications of damage. These packages are therefore set aside for inspection. The inner package consists of lead, which must be cut open; this having been done, although no damage is found to exist in the tea itself, these chests come prejudiced before the buyers from the fact that they have been subject to suspicion, and that their external condition was inferior to the others and exhibited symptoms of injury. Tea is so delicate an article that, like Cæsar’s wife, it must not only be free from fault, but must be free from suspicion of fault: and the cutting open the lead is itself a detraction. But the underwriters argue that they insure the tea itself, and not the package. This is, however, incorrect. They insure both the article and the package which contains the article: and they stand in this respect in the place of the merchant whom they insure. If he by the consequence of sea-water be subjected in a legitimate and comprehensible manner to a loss on his goods, the underwriters who guarantee him are bound to put themselves in his position.

The frequency of teas being injured by “sweating” and arriving at market out of condition, led to much investigation of the subject a few years since, with a view to discover the cause of so much damp exhalation in the hold—called “sweating” (greater in some ships than in others), and to find means to prevent it. In

China the inquiry was pursued with energy, and probably led to beneficial results.

But a lower price may have to be submitted to on tea even without the external staining,—from mere prejudice. The fact of very fine and delicate teas coming out of a ship which has had extreme damage in other parts of her cargo, gives a *prima facie* presumption that the quality of the tea has suffered. Where the circumstances of a ship's voyage are very strong this is a sort of claim that would probably be met by the underwriters in a compromise.*

Loss of Labels.

The effects of sea-water on the external packages, though it never reach the article itself, may be very serious. With pickles, sauces, some wines and liqueurs, and confectionary, the preservation of the labels is of the utmost consequence: their injury or loss makes the goods nearly unsaleable; not only because the unsightliness of the bottles, &c., acts against the retailing of them, but still more, because the kinds cannot be distinguished or warranted. Here, then, sea-damage to an external part has as real a depreciating action as if it happened to the substance itself in other kinds of goods; and there can be no reason for underwriters rejecting a claim in respect of this kind of loss.†

* The following memorandum, entitled the "Tea Clause," is commonly adopted by the London insurers to avoid questions of this kind respecting tea:—

"Average payable on each ten chests, twenty half-chests, and forty boxes, following landing numbers; but no claim to attach for wet or damp in respect of any chest (or other package), unless the tea therein shall have been in actual contact with sea-water."

† I have, on more than one occasion, made the practical suggestion

Bursting of Bottles.

At first sight it would seem that liquids in corked and capsuled bottles, as champagne; or corked and tied only, as ale and beer,—would be particularly free from effects of damage. It is not always so, however. The straw in which the bottles are packed becomes wet, rotten, heated; then the corks fly or the bottles burst, and there is often under these circumstances a great amount of damage. This, too, is claimable of the underwriters.

Furniture also suffers much when the straw with which it is packed in crates and cases gets rotten. The support being gone, the furniture becomes loose in the package and breakage ensues. Even marble tops of tables and washing-stands are broken in this way. Sea-water, too, and vapour destroy the polish, and dissolve the glue in the joints.

Liquids.

The liability of all liquids to loss by ullage proceeding from the casks leaking, even where no specific injury has happened, is so notorious that it makes claims on liquids somewhat difficult to settle with underwriters. It has even been maintained by the latter that they are not liable in respect of loss of liquids. This is a clear mistake; and unless they insert the warranty which exists in several East Indian policies, excepting loss on liquids, they are not exempt from claims. But as ullage or

that by having names in relief moulded on the bottles when they are cast, this kind of loss might be greatly reduced, if not entirely avoided.

leakage is of so common occurrence, it requires very clear and definite evidence that there was violence or some real cause of loss on the voyage, and that the loss of the liquid was not the result of faulty or unseasoned packages; neither that it arose from imperfect quoining and stowage. It is necessary to show by the ship's protest that at some period an undue and accidental pressure was exerted on the casks. The disturbance of the stowage of cargo by a ship being thrown on her beam-ends, or by striking the ground suddenly, is sufficient to account for pressure and consequent loss. But even when a claim is established, the ordinary loss by ullage which experience has ascertained must be deducted from it. The law does not lend much countenance to the setting up the "usage of Lloyd's" against underwriters' general liability. So in the instance of liquids, when it appeared that oil had been lost by leakage, caused by the violent labouring of the ship in a cross sea, Lord Denman refused to admit evidence of a usage of Lloyd's to the effect that unless the cargo was shifted, or the casks damaged, underwriters were not liable for any extent of leakage, however caused, as a loss by the perils of the seas. His lordship told the jury to consider for themselves whether in their opinion the damage to the oil was in fact caused by the perils of the seas. "It may be very convenient," said his lordship, "for the underwriters to have such a general rule, and for the commercial world to submit to it; but if they mean thereby *to control the effect of a plain instrument*, they should introduce its terms into the policy." *

Liquids that are packed in tins, such as castor-oil,

* *Crofts v. Marshall*, 7 C. & P. 597.

occasionally leak out from the sea-water having acted on the soldering of the cases, and sometimes having corroded the tin-plate itself.

A fire occurring in a ship will account for excessive leakage both from casks and tins, though it may not have touched them itself.

Oil Damage.

Among consequential damages must be placed the damage done to goods by oil, by tar, and by bilge-water, no one of which ought to have had any proximity to dry goods. It may happen from want of proper stowage and dunnage; but it may also happen from sea-perils, from there being so great a leak that oil and tar, which may have escaped and found their way to the bottom of the vessel, have been upborne by the water in the ship and deposited on the goods, although the latter were properly stowed. If an interval elapse before the goods are discharged and inspected, the only traces that remain on the goods may be those of tar or oil, and it would require the master to explain the circumstances by which the tar, the oil, or the bilge-water were thrown and left on the goods, in order to relieve the ship from consequences. Experience shows us that the effects of concussion, stranding, and the heaving down of ships by seas are extraordinary, and such, in some cases, as would be deemed incredible were it not for contrary proofs being exhibited. Goods which were placed at the bottom of the ship have been tossed up to the top; bars of iron shifted from a longitudinal position to a transverse one, &c. A case has occurred in which tar damage resulted from a stroke of a sea having given the ship

such a shock that the tar-cask, which was in its proper place in the fore-castle, was thrown to a distance and emptied, and the tar made its way to the cargo and injured it.

Fresh Water.

Liability for damage to goods is not confined to sea-water as a cause. Damage occurring in rivers by fresh water is equally claimable. It is not likely to create so much injury as salt water, and it is not so easy of detection. Sea-water damage is commonly tested by the tongue.

Water thrown down the Hold.

This subject has been already considered in the section relating to General Average. Three things may happen in the case of fire in a ship's hold. Goods may be damaged by fire alone; or by water alone; or, jointly, by fire, and water thrown down to extinguish the fire. Damage by fire simply and also by fire and water are claimable on insurers as Particular Average, and are not exigible on the whole interests by general contribution, as is the damage by water alone: and even the last may leave a claim over, as Particular Average, if the value in policy exceeds the market value brought into General Average. This margin is recoverable from the underwriters on goods, unless those goods have been insured "free from Particular Average," or that the whole damage does not amount to the three or five per cent.

Loss in Forced Discharge.

In the same class also, up to this time, are placed those deteriorations of quality and losses in quantity of goods discharged, though for the general benefit or necessity, in a port of refuge, if it be at a wharf or proper landing place. Goods discharged under more difficult circumstances, as into lighters at sea, are conventionally allowed in General Average. This subject is undergoing discussion at the present time, and it is possible that another view may be adopted as more consistent.

Excess of Damage on Tobacco.

In all species of goods, with one exception, the loss, whatever it may be, is paid in full by the underwriters if it amounts to the required limit of damage. The warranty is destroyed and the underwriter becomes liable. The excepted case is tobacco, in casks, from America. On this interest the policies contain the following clause: —“In case of Particular Average to pay the excess of five per cent. on the value of ten hhds.” This limitation arose from the special circumstances under which tobacco is shipped in Virginia and elsewhere. The casks, which are large, are rolled down, often from a considerable distance, to the shipping-place over roads that are frequently wet and bad. A certain degree of damage to the outside part of the contents of the cask is usual and expected, whether the tobacco meet with sea-perils or not. It is calculated to be, on the average, five per cent. Any sea-damage supervening on this is to be paid. When the casks are in the warehouse the contents are

taken out, and the outside of the mass is cut off with hatchets, and burnt or exported.

The same clause is occasionally met with when the interest is tobacco in bales: but it is rare, and the same reasons for its introduction do not apply. The limitation of a claim, making underwriters only liable for the excess of a stated proportion, is very general in French and some other foreign policies, and is called the *franchise*. In these if a claim amount to four per cent. of value, one per cent. only is recoverable from the insurers. Such rules resolve themselves into a question of premium; and seem to be only ringing the changes on equivalents. Already, insurances are invented for taking the risk of *franchise*.

Estimates of Damage and Compromises.

The agents of Lloyd's in foreign countries are empowered to use a certain discretion when their superintendence is requested in cases of damage. If it appears to them that the advantage gained by a sale at public auction is more than counterbalanced by the expenses attendant on it,—and in many places these are very high, they are at liberty to cause an estimate to be made, by brokers or merchants conversant with the species of goods in question, of what the value of the damaged merchandise would have been in a sound state, and what it is worth in its actual condition; or, what amounts to the same thing, the computed difference which the damage has caused in value. If the Lloyd's agent feels satisfied with the fairness of the estimates, he agrees with the merchants that the sale shall be dispensed with, and that the estimated result shall stand in lieu of it. It

is a mistaken notion to suppose that this arrangement *binds* the underwriters arbitrarily to pay the difference in price, whatever it may be, without reference to the ordinary conditions of the policy. It does not do so. The Average is still subject to the same manner of treatment as if the goods had been sold; the advantage gained being the prevention of a heavier loss which often attends the forcing goods on a market by auction, and the pretermission of the sale charges, which in some places are excessively high. If underwriters occasionally pay compromised claims which do not amount to the minimum in the warranty, it is to encourage an economical method.

Cotton picked and made Merchantable.

An exception in the same direction has been made in favour of the article of cotton-wool. By some extra labour, in mending the damaged bales and putting them into merchantable condition by picking off the portions actually wet or discoloured by sea-damage, so beneficial a result is produced and so great a saving is effected that underwriters, with a view of promoting this economic treatment, have agreed, very generally, to put the cotton thus conditioned in a more advantageous position than the bales which are sold damaged in the ordinary way. While some still apply the ratio of loss to the insured value, they admit all the loss on the pickings, without requiring that it should amount to any particular percentage. Other insurers pay the loss on pickings without, even, reference to insured value.

The Warranted Percentages.

According to their susceptibility of damage, all goods have been divided in classes which are enumerated in the memorandum at the foot of the policy, and a greater quantum of damage is necessary to establish a claim on one sort than on another. And if from local or temporary circumstances any kind of merchandise is out of favour with underwriters, a written clause is put into the policy either excepting such goods altogether from claims, or putting such a percentage for the limit as the underwriters consider will sufficiently protect themselves. There are a few descriptions of goods so notorious for their liability to get damaged that, even without a written memorandum, underwriters consider themselves not bound to admit them under the general term of "goods," unless specially informed that they make part of the interest insured. Corn, fish, salt, fruit, flour and seed are warranted free from Average, unless general, or the ship be stranded. In some policies the exception runs "stranded, sunk or burnt." Latterly, there is often added to these exceptions the word "collision"; but generally with a limitation, such as "the collision to be such as may be reasonably supposed to have caused or occasioned damage"; or "the damage." The second of these exceptions seems rather a word of surplusage; for if a ship sink in deep water there is a total loss, and if she sink in shallow water, and rest on the bottom, that is a stranding. With regard to fire there is some difficulty; and a refinement is sometimes resorted to in changing the expression "burnt" into "unless the ship be on fire." When this clause is inserted, a very partial and

transient fire in any part of the ship itself is sufficient to defeat the warranty. Underwriters may also be liable for partial damage by the goods themselves being on fire, or being injured by a fire among other parts of the cargo.

The two terms corn and seed include all cereal produce except rice,—(on which Average is claimable if it amounts to three per cent.) If, however, any exotic seeds come exclusively under the name of drugs, and not of grain or seeds, they will pay Average when the damage amounts to three per cent. Grain and seeds which have been put through any manufacturing process by which the power of germination is destroyed are no longer looked upon as the “corn and seed” of the warranty. So pearl-barley would pay Particular Average in case of damage. Spices in the form of seeds are not excluded from Average. The most universal test as to the liability of such goods to Average is whether the power of germination exists or is destroyed. If it exist, as it does in barley, the grain is warranted free. If it have been destroyed, as it has in malt, the goods are liable to Average. Oil-cake, though not enumerated in the warranty, is always considered an article free from Average. In the policy of the London Assurance Company rice is excluded from Average specifically. The term fish includes salted and dried fish as well as fresh. It includes cured or red herrings, but not anchovies, which, under the name of “oilman’s stores,” are subject to Average.

The salt mentioned does not include saltpetre, but the inclusion of the latter is stipulated in the policy of the London Assurance Company. The term salt is used in the ordinary and not the scientific sense. Neutral and

other chemical salts are not included in the term. Soda, potash, &c., pay Average.

Flour includes meal of barley, &c., but not sago flour, with which it has nothing in common except in being pulverized. The latter is sago reduced to powder, and does not proceed from any grain.

Sugar, tobacco, hemp, flax, hides and skins are warranted free from Average under five pounds per cent. Sugar includes molasses. It embraces saccharine productions from other plants besides the cane; as maple sugar, beet-root sugar, &c.

Hemp and flax do not include jute, a fibrous material more recently introduced. It is very similar to hemp and flax, and is quite as susceptible of damage.

All other goods pay Average when it amounts to three per cent. and upwards; but special agreements can be made in reference to any species of goods, altering the customary percentage in the warranty or entirely shutting them out from payment of Average. In the latter case underwriters charge a less premium; for experience has shown that claims arising on policies in respect of Average losses do not materially differ in amount during the year from total losses during the same period.

India Policies.

In policies effected in the East Indies and payable in this country there are several distinctions. By their warranty no article is totally excluded from Particular Average, but they raise their limits, and the generality of them have ten per cent. minimum for the more hazardous goods, and five per cent. for the remainder. Some of them contain no exception in favour of strand-

ing, and they enumerate several kinds of produce not in our policy, but which are staples in India. They class saltpetre with salt. Some exclude all damage to metals and loss of liquids. They also except damage arising from gales, &c., during certain seasons and in certain regions. The majority of the Indian companies formerly contained a proviso that two per cent. was to be deducted from the amount of the claim in settling it; the effect being, in case of loss, to raise the rate of premium by two per cent. of the sum insured above what it professes to be.

The stipulation for deducting two per cent. from claims for loss and Particular Average appears to have been customary, in former times, in English policies. It has been removed latterly from the conditions of most East India and China insurances. When the effect of this abatement is examined it will be seen to be *a bet on the transaction*. For, whereas, if the matter insured arrives without claim for loss or damage, then only the agreed premium (which for illustration we will call two and a half per cent.) is received. Should the adventure, however, turn out a total loss, then by this arrangement the premium becomes four and a half per cent., instead of two and a half; *i. e.* original premium two and a half per cent. *plus* two per cent. contingent premium. On all claims for loss, &c., less than total, the effect will be similar in its relative proportion.

Goods in Bulk.

The permission has already been spoken of which is granted to the assured, by the introduction of the Average clause in the policy, of subdividing the cargo

or the species of goods insured into parcels, or series of a definite number of packages, in order to render the insurance more effectual. By this means a much smaller quantity of damage becomes recoverable than if it were necessary to establish an amount of three or five per cent. on the whole of the cargo or interest. On manufactured goods and some valuable species of produce, instead of a series, each single package is allowed, in general, to stand by itself, and if the damage amount to the appropriate percentage for that kind of goods on the separate package it is claimable from the underwriters. In India and China policies this permission is very frequently expressed in a monetary amount, thus; "to pay Average on each 2,000 rupees value," or "each value of 250 dollars." And this method has the advantage of giving a certain uniformity of value to series. In English policies, and in some India ones, the words are taken to imply that the terminal series, although only a broken number, is to be adopted as a full series, which is a farther advantage to the assured of great importance; because by the system of dock management the damaged packages are usually returned as falling at the end of each mark; and consequently, in a majority of cases, in this broken or terminal series. It is not by coincidence this happens, but because as the goods are landed the damaged packages are very commonly set aside and collected into one lot at the end of the sound portion. Although this arrangement is perfectly known, and underwriters understand that the heaping the damaged packages together into the final series, or the two or three last series, is a voluntary act, it has its advantages. It concentrates the damage, it is true, and

frequently causes the establishment of a claim which would have fallen to the ground had the damaged packages been scattered through the parcel in the natural order in which they were taken out of the ship's hold; but, on the other hand, this segregation of the damaged from the sound prevents a more general depreciation, which would happen if in every pile there were a portion of damaged packages, lowering the value throughout the shipment. For hemp, flax and tow, which are often so loosely packed in bundles as scarcely to be distinguishable, the clause sometimes reads, "to pay Average on each five tons as landed," or "on each ten tons as they rise from the hold."

In all other cases of goods in bulk the Average must be paid on the whole quantity; no subdivision is permitted. Goods, however, in bulk are either from their nature "free of Average," as corn, fish and salt; or they are of comparatively small value, as against goods in packages, for they consist of wood, coals, sulphur, stone, clay, &c.; the most valuable being a cargo of iron, or of the ores of iron and copper. A stranding destroys the warranty and puts them all on a level as to claim; the damage being then recoverable from the underwriters whether it be large or small, whether it had been declared altogether free from Particular Average, or subject only to Average in case the damage amounted to three or five or ten per cent., except by the policies of the East Indian Assurance Companies.

It must not be lost sight of that the expressions "to pay average on each package, &c.," and also "deck-load to be deemed a separate interest," or "Average claimable on deck-load separately," are additional privileges

granted to the assured. They do not, nor were they intended to, curtail his previous rights of claiming. They were not meant to take away his power of claim on the whole interest insured, when damage was sufficient for that purpose. So, too, with insurances on steamships, when the values of hull and machinery are declared separately in a policy, coupled with the clause "to pay Average on each interest." This is also an augmentation of the protection the assured receives from the insurer. It is not so much an option given him, as a right to integrate the damages of the two interests in one, where necessary, so as to allow the surplus of one damage to supply a defect on the other separate interest; or where the damages on both interests are not sufficient to produce the necessary amount for a claim on the entire insurance, it permits the assured to make his claim on the one interest which has a sufficiency of damage.

Of Extra Charges on Damaged Goods.

Besides the loss in value of the goods themselves when injured by sea-water, &c., such damage very frequently gives rise to charges which would not have been incurred in the ordinary course. These extra charges differ in amount and number in various places. They appear to be fewest and lowest in amount in London; they are more in number in Scotland than in England: and abroad there are many places where the charges rise so high that they become a very serious tax in all cases of damaged goods sold.

Extra charges consist of expenses of and about inspection or, as it is commonly called, survey: about the

preserving and conditioning goods so as to prevent further loss or to reduce the existing deterioration ; public sale expenses ; charges of Lloyd's agents ; and expenses of documentation.

In London, there are rarely any other charges than what arise in the dock warehouses, viz. the shifting of partially-damaged packages into others, and the providing new packages for those which are broken and decayed. Goods in London are almost universally managed by brokers, who occasionally make a charge for surveys and certificates ;—the articles on which surveys are always paid for are wood-goods and tobacco. It is so generally the custom to sell goods by auction that extra charges in respect of public sales seldom arise ; and no legal or notarial documents are required.

It is a curious circumstance that the Scotch, distinguished as they are by clear views and strong common sense in their commercial pursuits, should have fallen into the system of submitting to be fettered with legal proceedings and documents in cases of damage to goods, which a reference to transactions of the same kind in England abundantly shows to be unnecessary. Petitions, warrants, reports, all legally drawn, are gone through in cases of damage.* A protest, there and here, is a valuable document as setting forth in a clear manner an account of the transactions and disasters of the voyage : but as that is generally provided by the ship for the owner's own protection against claims on damaged goods, it does not form an extra charge on the mer-

* Documentation in Scotland seems of late years to be much reduced.

chandise damaged. In Scotland, there are in addition, roup expenses, bell-man, "the tuck of drum," &c., in a rather long list, but in general not amounting to any large sum on the whole.

In English colonies and in foreign countries extra charges are more numerous, and sometimes excessive in amount. There are formalities before the Tribunal of Commerce, formalities of Port Wardens, formalities of Lloyd's agents, formalities of British Consuls and Vice-Consuls. There are charges for merchants who inspect the goods, coopers who open the packages for inspection, workmen who close them up again, brokers who estimate their value. The government has an auction tax, and the poor receive a fractional impost (generally the smallest charge of the whole). Then there are advertisements in public papers, and handbills printed, posted, and distributed. There is the hire of the auction room and of the sampling apartment. There is the auctioneer's commission, and carriage of the goods to auction. There are criers, trumpeters, and bason-beaters. Sometimes a full copy of the protest accompanies every set of papers by the same ship, if there be fifty issued: and finally there are duplicates of documents, and postages. Even now this enumeration does not comprise every form of charge. It is not intended to say that all these expenses are included in every place; but considering that the process of dealing with damaged goods is gone through as frequently in London as in other places, and that it may be said with truth that claims are more moderate here than they are abroad, it is plain that these extra charges are for the most part useless, and have no effect in reducing the number or

the amount of claims against underwriters, which they so formally and solemnly avouch.

Charges paid by the Buyers.

Perhaps there is no sort of charges more objectionable and more mischievous than those concealed ones, the charges which are paid by purchasers of goods at auction. When any legitimate reason is sought for them, any advantage gained from them, we find none ; and we are led to fear that it is a system pursued in some places purposely to increase the claim on underwriters. The action of it will be obvious when described. For instance :—In St. Petersburg, it was found that the purchasers at public sales have (or had) to pay four per cent. of sale charges : and of this sum no mention made in the account sales. In Leghorn two and a half per cent. is payable by buyers. In the latter place, however, these conditions are openly stated in the papers, and therefore can be dealt with in adjusting claims. But take the case of Russia,—and there may be other places in which the same plan is pursued and we remain ignorant of it :—A buyer, knowing he has to pay four per cent. of charges on the goods which he purchases, will of course give so much less in purchase-money : he will give only ninety-six per cent. of the value he puts on the goods : for when he has paid in addition four per cent. of charges he has given the value at which he estimates them. No blame, therefore, attaches to the buyer. But a great effect is produced in the claim on the policy. In the first place it is to be premised that charges follow the claim for deterioration : if this falls to the ground the charges are not claimable from the underwriters : if only part of the

damage becomes claimable a proportionate part only of the charges attaches to them also. There are, consequently, two motives for making the primary claim (that for deterioration) as high as possible; first, for its own absolute result; and secondly, for the sake of bringing in as large a part of the charges as possible, since they are governed by the amount of deterioration. Two instances will exemplify this clearly. First:—

Let the sound value of goods warranted free from	
Average under 5 per cent. be	£102
Let the value in damaged state be	£100
Then, as the purchaser has to pay 4 per cent.	
of charges, he will give less	4
	<hr/>
	or £96

The difference is	£6
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or 5·882 per cent. deterioration.

And thus having established a sufficient deterioration to make underwriters liable, it draws in all the charges with it. Even, should the above four per cent. be deducted from the amount of charges, the arrangement is still very beneficial to the merchant, for he recovers the damage on the goods and the balance of charges, neither of which he would be able to claim if the following compensating method adopted by Adjusters in such cases be pursued.

Let the sound value of goods be	£102
Let the sum paid the auctioneer in money be	£96
To this the Adjuster adds the other payment	
which the purchaser makes to somebody for	
charges, and which completes the value, viz.	4
	<hr/>
Together	£100
	<hr/>
Difference	£2

i.e., a fraction under two per cent. of deterioration, therefore not claimable from the underwriters; and consequently the accessory expenses called extra charges are not claimable either.

To the purchaser it is plainly indifferent whether he pay 100 per cent., that is, the entire value he sets on the goods, in one sum to the auctioneer, or whether he pay ninety-six per cent. of that value to the auctioneer, and four per cent. to some other proper person. It is a mere matter of arrangement, but one that has a very decided effect upon the underwriters by manufacturing a claim which would otherwise not exist.

At Leghorn, where a similar arrangement is made, there is not the same objection, because the condition of sale is openly stated in the papers; but the same method of dealing with the charges is pursued in adjusting the claims at the last-mentioned place as at St. Petersburg. In some other countries cases have been observed where the charges to be paid by the purchasers were as high as ten per cent.

At Calcutta an objectionable practice was brought to light some years ago; one of the same description, but not having exactly the same doubly mischievous effect. The auctioneers at Calcutta very commonly charged the immense brokerage on sales of eight per cent.; but they privately returned two per cent. to the merchant. Whilst this remained unknown in England it was a dishonest action to continue the practice; and subsequently the system was altered.

In fact, all covert arrangements of this character in trade are either a useless encumbrance, or else they are worse and have a sinister intention. Open and above-

board dealings we have invariably seen to be most saving in the long run, as they are most satisfactory at all times. These remarks are not levelled at individuals who pursue a practice which they find already established,—but against a system. Whoever breaks through a pernicious custom, more honoured in the breach than in the observance, is a courageous man, and deserves well of the community.

The specific charges consequent on goods being sold damaged sometimes obviate some ordinary charges; when this is the case the extra charges are to be reduced by the amount of such saving. Thus by selling for cash at auction an ordinary guarantee commission is sometimes got rid of. And many merchants make a difference in their own commission as consignees when goods have been sent to auction, because they have been spared some of that trouble for which the ordinary rate of mercantile commission was a recompence. It must be added, however, that a reduced commission is by no means an invariable consequence of selling goods through an auctioneer.

INSURANCE.

LONDON POLICIES.

Excluded from Average, unless Stranded.

Lloyd's Policy.....	Corn, Fish, Salt, Fruit, Flour, Seed.
Royal Exchange Assurance Company do.	Corn, Fish, Salt, Fruit, Flour, Seed.
London Assurance Company do.	Corn, Fish, Salt, Fruit, Flour, Seeds, Saltpetre.
Indemnity do.....	Corn, Fish, Salt, Fruit, Flour, Seed.
Alliance do.....	Corn, Fish, Salt, Fruit, Flour, Seed.
Marine do.	Corn, Fish, Salt, Fruit, Flour, Seed.

Excluded from Average under 5 per cent., unless Stranded.

Lloyd's Policy	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	<div> <div>And all other</div> <div>goods not</div> <div>enumerated</div> <div>under 3 per</div> <div>cent., unless</div> <div>Stranded.</div> </div>
Royal Exchange Assurance Company do.	Sugar, Tobacco, Hemp, Flax, Hides, Skins, Rum.	
London Assurance Company do.	Sugar, Tobacco, Hemp, Flax, Hides, Skins, Rum, Rice.	
Indemnity do.	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	
Alliance do.	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	
Marine do.	Sugar, Tobacco, Hemp, Flax, Hides, Skins.	

In many policies the exception is expanded into “unless the ship or craft be stranded, sunk, burnt or in collision” ;

the last contingency being guarded by certain conditions, as previously mentioned.

The characteristics of China and East India Insurance Companies' terms are principally that all kinds of merchandise are by their policies subject to Particular Average when it exceeds the warranted minimum, with a very general exception of metals and liquids, which are excluded from Partial Loss: that few of these Associations allow a stranding to reverse the warranty, as in English policies: and that the minimum is fixed higher than in England. Three per cent. was only found formerly as a minimum for any interest insured, in Bombay policies; but latterly that limit has been admitted by many China companies for silk and tea. The articles reputed more hazardous are excluded from Particular Average under ten and fifteen per cent., and the less susceptible under five per cent. Ships and freight also free under five per cent. The delay claimed for payment is very generally shortened—often to a month; and but two or three companies remain which stipulate to deduct two per cent. in paying the claim.

OF PARTIAL LOSS OF FREIGHT; SOMETIMES CALLED PARTICULAR AVERAGE ON FREIGHT.

Before considering the circumstances of Average which affect freight, it will be well to describe what freight is. Freight is the sole object of the ownership and employment of merchant shipping; it may be said to be the rent and profit derivable from ships; the usufruct of this species of property. It would not be a bad guess to say that *fructus* is the root of the word *freight*. It has also been legally expressed that freight is an incident of a vessel, considered as a chattel, *i. e.*, if

chattels legally possess incidents. It must be farther noticed that freight requires two parents. If the ship be its father, in the goods carried must be found its maternity ; for goods are the mother of freight ; freight resides in the merchandise. If the merchandise, even without the carrying vessel, be lost, the freight is lost with it. The cases where this is not so are comparatively rare. In a divided cargo freight is also divisible ; and the loss of a package generally involves the loss of the freight of or in that package. The contingencies to which goods are exposed are usually contingencies to freight in addition. It was an old, and now almost exploded notion that the reloading charges and expenses of sending to sea a ship and cargo which had put into a port of distress and was there unloaded, solely attached to the freight because they were undertaken expressly for the sake and purpose of the ship-owner gaining his freight. This is no more true than it would be to say that the sole object of getting to sea again was to cause the cargo to reach its destination, or that the vessel itself might return into its owners' possession and further use. It is now needless to repeat the arguments which were used in the first editions of this volume to controvert so erroneous a view ; for those arguments have since been accepted, and the law has in great measure been declared, putting exit charges on the interests generally, and relieving freight from being exclusively burthened with them.* Clearly all the interests are concerned in the safe termination of the joint adventure, and all should contribute to the steps which have directly promoted that end.

* *Attwood v. Sellar*, L. R. 52 Q. B. D. 286 ; *Svendson v. Wallace Brothers*, 4 Asp. M'L. C. 550. (The appeal in the latter case is still *sub judice*.)

To proceed then with our subject, the freight of goods is the shipowner's payment for carrying another person's goods in his vessel ; or it is the hire of his ship itself when it is let as a chattel to another person for a given sum or at a given rate. In the one case the shipowner is a carrier ; in the other he may be called a landlord, by the same inexact manner of expression under which we call the possessor of a mere house a landlord. His profit or hire is an insurable interest. It is insurable when, and so long as it is at stake. If he receives it before the ship's sailing it would be mere waste of the premium to insure what is already certain : he has no right to insure. If he is to receive freight from the shipper whether the vessel complete her voyage or not, it could only be insurable from a doubt of the shipper's ability to pay apart from the goods themselves should they be lost. An owner may feel satisfied as long as goods remain in his possession as a material guarantee for the freight of them, or while he has the power to stop them immediately after he has completed his part of the mutual agreement by delivering them out of his ship ; but he may not have the same confidence in the solvency of the shipper, especially if that shipper's venture be lost.

It is quite plain that freight is a thing that may be at risk,—the safety of it be endangered like other interests : and, moreover, as its existence depends on the right delivery of the goods its fate is very much involved in theirs. It is so tied to the goods that it may be said to sympathize in what concerns their safety and right direction.

Freight, therefore, when at risk is a thing insurable by the shipowner ; and when it has been paid in advance

it becomes, as it were, latent in the goods ; it becomes a part of them, and so is insurable by the shipper of goods under the increased value of the merchandise owing to the pre-payment of the freight ; or the shipper may insure the advance separately.

With regard to interest in freight on policies, it has been treated in a more liberal manner than any other subject of insurance. In all other insurable interests the true value, with a little margin for profit, is the extent of insurability. But with freight a sum is allowed to be covered larger than can ever be realized by the safe arrival of the ship at her destination. The gross amount may be insured—but the gross amount can in no case be secured by a vessel completing her voyage. Directly a charter is made, the freight secured by that charter begins to melt away by ordinary courses. First there is the commission for procuring freight : then port charges whilst the ship is in harbour. Attendant on her sailing are light dues, pilotage, &c. From the first day the crew arrive on board their wages commence, and continue day by day to lessen the freight in an ordinary or natural manner. The expenses of taking in and landing the cargo are often at the ship's charge ; and there must be dunnage provided, and frequently ballast. It is true that the stores and provisions are considered part of the ship, and therefore are not allowed to be taken into consideration in estimating what the net freight would be ; nevertheless, in the owner's mind, they generally go down as an item against his profit by freight. It is clearly impossible that a ship can ever save her whole freight under the most favourable circumstances. It is more likely that she will never realise above half of it ; and it

frequently happens that by adverse winds, bad sailing powers and the like, the whole freight is consumed in expenses without any accident or peril of the seas supervening. So that it is clear, in any case (speaking of a single voyage), when an owner is fully insured for his freight, the loss of his ship at any point, even at the very outset of the voyage, is better for him, as regards that freight, than her safe arrival. The policy will always in such a case give him more than a completed voyage can do. This is very contrary to the regulations relating to interest in other subjects of insurance. For looking to net results, a shipowner may insure freight for more than he can ever at the best of times receive if he be uninsured. But discarding the notion of profit, and regarding the actual freight an owner is to receive if his vessel arrive safely at her destination, it will be seen to be quite just that he should be able to protect himself to the extent of the entire sum contingent on the completion or non-completion of the voyage.

By a practical inconsistency, whilst all the incidental and absolutely certain expenses of the voyage are to have no effect in reducing an owner's insurable interest in freight, they are to give him assistance in reducing the amount on which he contributes in respect of his freight in case of General Average. The freight is to be diminished by the expenses named (victuals excepted), which are incurred *after* an act of General Average; and so the contributing value of freight is small in comparison with that of the ship and the cargo. The hardship of this lies on the ship and cargo, because they contribute as much more in proportion as the freight contributes less. To the underwriters on freight it is a relief,

as they never are called upon to contribute on the amount which they really have at risk ; for *their* risk always continues the same, viz. the sum insured. At whatever part of the voyage the ship might be lost they must pay a total loss to the extent of the whole policy : therefore any remedial or preventive measures that are influential in saving the ship, go to the extent of saving the whole of the insurance on freight ; and the commonest reasoning will show that in conformity with the equitable regulations for the contributions of the other interests, a payment towards a benefit received is to be on the amount which was benefited, and that freight ought not to be an exception. The opposition of this view to prevailing custom does not prove anything against its correctness and truth.*

Freight is warranted by the memorandum free from Average under three pounds per cent., unless general or the ship be stranded. In this it resembles the ship itself, and merchandise, except the goods specified by name in the policy. No claim can arise on freight from deterioration of the quality of the goods with which it is connected, and which reach their place of destination : a claim can only be produced by deficiency in quantity, and it must amount to three per cent. of the whole interest in freight, for it admits of no subdivision. To ascertain the loss, it is usual to find the average weight of the sound portion of each species of goods on board ; or, if the same species is further distinguished in itself by different-sized packages, &c., then a comparison

* In my *Manual of Marine Insurance* I have gone so fully into the subject of freight, as an interest, that I need not add more in this place.

must be made between the sound and damaged parts of each plantation-mark or other division of that interest. The average sound weight being thus obtained, the quantity lost is ascertained by a comparison of the actual out-turn of the cargo with what should have been the result had the cargo arrived without damage. The loss has then to be applied to the insured value in the same way in which damage to goods is treated.

Policies on freight are frequently left open, that is, unvalued, owing to the uncertainty which often exists as to what quantity of goods the ship may procure and what she may deliver; for freights hitherward are nearly always payable on the quantity delivered. To find, therefore, the exact interest on an open freight policy is a material condition precedent to stating a claim. The formula will be the quantity delivered + the quantity deficient, + premium of insurance and charges of recovery. The method of finding in one operation the premium on premium, and so on *ad infinitum*, is called *covering* the interest, and is very simple.

The interest on a freight policy has its inception, that is, begins, when a ship commences taking in her cargo. Should the vessel, under charter, be lost during the process, even when she has only the minor part of her lading on board, the underwriters would be liable for a loss on the whole sum insured. If the ship be not chartered, but merely laid on a loading berth, the interest in freight is only the quantity she had taken on board at the time of her loss. If, however, it be shown that other goods were engaged for her, and were ready for shipment,—lying on a wharf, for example,—underwriters often allow a liberal construction of the rule, and permit the

engaged freight to be considered interest at risk. If it is expressed in a policy of insurance that a vessel is to sail from A to B, to take in cargo there for C, the risk on freight commences on leaving A; for the contingencies affecting the intended freight by charter-party are as great there as at any other part of the voyage.

Some of the most considerable difficulties relating to interest in freight arise on policies on African and other bartering voyages. The insurance is a sort of floating policy, and the interest is, in fact, always fluctuating.

If goods are sold at an intermediate port on account of damage, the loss of the freight falls on the freight policy, in the same way that the loss on the goods falls on the policy on goods. The owner of the goods sold is entitled to the whole proceeds of the sale.* Our law does not permit a division of freight, nor recognise distance (*pro ratâ*) freight. An arrangement on the spot before goods are sold might be justifiably made for payment of part of the freight: and a master might (at his own peril) refuse to allow damaged goods to be sold unless the whole freight on them is paid to him. Freight differs from other interests in that it is the only one which is capable of being restored by any act after a loss. If goods are necessarily sold for damage in an intermediate port the captain may fill up the ship with fresh goods, and thus prevent loss in respect of freight. He is not bound to do this, but it is a very proper course to take whenever practicable.

* *Pirie v. Middle Dock Co., Nisi Prius*, 5th April, 1881. Before W. Williams, J.

Advance of Freight insurable, &c.

Advances on account of freight may be insured *eo nomine*, and are good interest. It was thought formerly that any advance which was repayable out of freight could not be legally insured. But by the case of *Hall v. Janson** it was decided that money advanced to the assured as owner of the ship, on account of the cargo loaded on board, is an assurance on freight, and liable to General Average. And moreover it was also ruled that a custom alleged to exist in London, where the policy was effected, that assurers of money advanced on freight were not liable to make good a General Average loss, was no answer to a claim on such a policy which, according to the interpretation given to it by the learned judge (Chief Justice Campbell) expressly stipulated that the assurer should be liable.

Though it has been stated in this section that freight stands in a preferential position as to General Average, compared with other interests, it has been also shown, in a previous section, that its situation with regard to reshipping and exit charges was prejudiced and unsatisfactory, till the decision in *Attwood v. Sellar*, and the inferential pronouncement in *Svendsen v. Wallace*, put freight, as to charges, on a fairer basis.

* 4 E. & B. 500.

PART THE FOURTH.

OF TOTAL LOSS.

Definition.

THE Total Loss of ship or goods means the total loss of them to their rightful owners, or, when insured, to the underwriters upon them. It is not necessary that the ship or her cargo be annihilated, to establish a Total Loss. It suffices that through some peril insured against they are removed from the control and possession of their rightful owners. Therefore if the ship be run away with by the captain and his crew, or be captured by enemies or seized by pirates, there may be a total loss to underwriters, although that vessel is really floating over the waters in as efficient a state as she ever was.

The term Total Loss includes first, the absolute and entire disappearance of the object; secondly, such a complete destruction that the proper use of the thing is irrevocably gone, and, as it were, its species lost; and all that remains "is but a wreck and residue,"—only a salvage out of the original article; and thirdly, as concerns ships, the position of a vessel being so much damaged and brought into such a condition of things by sea-perils as to be *constructively* lost: for if it take as much as, or more than, the ship's value to repair her and

pay contingent expenses, and get her again on her interrupted voyage, then she is legally and in effect lost: for the law does not compel an owner to spend a larger sum than his vessel is worth in order that he may restore her to her previous condition.

Foundering and Fire.

It is true that the first ideas which present themselves to the mind when we hear of a ship being totally lost, are commonly the destruction of a vessel by a violent accident, as when she founders in a storm, or is dashed to atoms on rocks, perishes by conflagration, or else by the more insidious consequences of leaks which at last cause her to sink and disappear. When evidence can be procured of the loss of a ship or her cargo in either of these ways it is obvious that a settlement for total loss with the underwriters easily follows. It is a notorious fact that a claim for total loss is paid more readily, and apparently more cheerfully, by the underwriters than most averages; although one comes to an irresistible conclusion that many vessels perish from what may be called natural causes, that is, by inherent defects, insufficiency of strength, and by overlading. But the record perishes with them. The waves which close over the sunken vessel effectually put further proof out of the question. Underwriters feel that to attempt to resist payment on the score of previous unseaworthiness is nearly hopeless; and so, according to a mental tendency perfectly understood, men submit themselves without struggling to what they take to be inevitable, and write off a total loss with a good grace when they would

fight hard to reduce a claim for average by a few shillings per cent.

Missing Ships.

Often no proof whatever is attainable of the loss of a ship. She sails and is never heard of. A fear gradually grows into a conviction that she is lost ; until a sufficient moral certainty is produced in people's minds to authorize the assured to ask payment from the underwriters as for a total loss. Before doing this a sufficient time is allowed to elapse, differing according to the voyage, to allow any possible information to arrive should the ship be still in existence. So ramified is the system of Lloyd's agency that there is hardly any part of the world from which intelligence is not procurable concerning shipping. From the central office of Lloyd's Secretary in London the eyes of those appointed to direct its very perfect mechanism sweep all the oceans, as the observation of the watchful astronomer traverses the heavens at night to discover a new comet or the disappearance of a star. The large volumes kept at Lloyd's, called the Index Book, afford an easy reference to the known history of all English and many foreign ships, so that the places and dates of their various courses can be traced. The press lends its aid, private correspondence brings in its quota of information, and government despatches complete the means of watching the enormous amount of property floating on the waters.*

* By the present system at Lloyd's, when the committee arrive at the conviction that the length of time since a vessel was last heard of amounts to strong presumptive proof that she has been lost, the vessel's name is " posted " as a missing ship, and her loss dates from the day she is so posted.

The length of time during which no tidings are received of absent ships and which is considered pretty conclusive of their loss is not invariably the same for all voyages or at all seasons of the year. As an approximation it may be said that two months for our neighbouring seas, three for the Mediterranean, four for the Atlantic, six for the Indian Ocean, and something more for the Pacific, during which periods nothing is heard of a ship, are the lengths of time which must intervene before a claim can be made on the underwriters for total loss on a missing vessel. In paying under such circumstances, insurers require an undertaking from the assured that the loss shall be cancelled should the ship afterwards come to hand. It may be said that an indemnity of this kind in case of the reappearance of the missing property should not be required; because any settlement on a policy clearly obtained in error or by fraud is not binding, and can be recalled. Yet as an unconditional settlement of a loss is not a desirable thing to disturb, it was laid down in *Houstman v. Thornton** that "if after the underwriters have paid as upon a lost ship she reappears, she will be treated as abandoned and belonging to them." This was in the case of a ship not heard of.†

OF ABANDONMENT.

There are some words and some significant acts used in men's dealings with each other which, from antiquity and convention, pass current for a higher value than their intrinsic worth. The particular circumstances which

* Holt, 242.

† Maude and Pollock, p. 484, 4th edit.

gave them birth may have changed or passed away, but the expression or the action claims a prescriptive right to appear ; and at last people are afraid to omit it, lest they should in some unforeseen manner be damnified by so doing. A father of the English law says that no deed of conveyance can be complete unless it contains the words "to have and to hold." Persons signing and sealing documents are careful to murmur, "This is my act and deed." The giving of the ring in marriage, of a peppercorn annually as the tenure of some leases, and a hundred other such time-honoured ceremonies, will rise to the reader's mind as instances of conventional forms in civil, legal and commercial transactions. "The emphatic word in the law-merchant, Abandonment," as Lord Ellenborough named it, is one of those things the importance of which is perhaps over-estimated. It has its uses and its force, as we shall see ; but we shall also see that the using it will not establish rights which do not exist, nor the disuse of it defeat a right really in being. The particular cases will be shown in which it is useful and intelligible as a compliance with a condition precedent. In this it resembles the noting of protest by a captain within twenty-four hours of reaching a port. The notation itself is a dry and unexplanatory form ; yet if omitted, the detailed statement of the voyage called the extension of protest cannot be afterwards made by a notary. There are also cases in which the act of abandonment is of the highest importance, and has a material bearing in proceedings on a policy of insurance.

It was in the time of war that acts of abandonment were of the greatest concern ; when captures and recaptures of vessels were constantly occurring, and there was

a particular necessity for some formal recognition of the vesting and divesting of ownership in property which was liable to such frequent casualties and changes. In more peaceful times, its true and principal value is discovered in those cases called constructive total loss, either of ship, cargo or freight. Incidentally it has still its uses and significance, though I believe they are smaller now than is commonly supposed.

I propose to consider the subject under the three following heads ; viz.—

The Effect of Abandonment.

The Right to Abandon, and

The Method of Abandoning.

It is impossible to prevent this part of the subject from being legal and technical, but it shall be my endeavour to present the matter in the simplest form possible. It must be premised that legal writers on abandonment have always reference to *an action brought on the policy* ; and they treat it in relation to its effect on subsequent proceedings. It must be remembered, however, that at Lloyd's and at insurance offices abandonment does not necessarily lead to litigation ; and that therefore many of the positions taken by jurists are inapplicable to the current method of business between underwriters and the assured.

Effect of Abandonment.

Abandonment is recognised by the laws of all nations. It is the cession and giving up of all right present and future in the thing lost, and the transference of all property and rights to the underwriter, so that they pass to

him. On acceptance of abandonment, the underwriters' title dates back to the time of the loss, and has relation to the *status in quo* at that time, although the *status* may subsequently have become altered.* Abandonment can be accepted or refused by the underwriter. It is generally refused by him, because admission of the abandonment places him in a somewhat different position with the assured, and he generally wishes to avoid any accession of responsibility, particularly as abandonments are frequently made when facts relating to the loss of the ship and goods are very imperfectly known. But, after all, it is the merits of the case which are decisive for or against an underwriter. If he accept abandonment, and it afterwards turn out that the facts upon which it was made were untrue or did not exist, the abandonment is nothing, does not bind in any way, has no effect. On the other hand, although the underwriter refuse acceptance of abandonment, yet if there were valid grounds for ceding the property to him, the notice given him will be sufficient; and in many cases, where the loss is such that no question can arise upon it, the notice itself is unnecessary, and the loss can be claimed without it. "The great convenience of making an abandonment," says Park, "has led to an opinion that it is more necessary than it really is. A party is not in any case obliged to abandon; neither will a want of abandonment oust him of his claim for that which is an Average or Total Loss, as the case may be. When there is an abandonment, the risk is thrown upon the underwriter: when there is no

* *Cammell v. Sewell*, 3 H. & N. 617; S.C. in error 5 H. & N. 728. It may be mentioned incidentally, that this case supports the authority of the *lex fori* over English parties coming within its action.

abandonment, the party takes the chance of recovering according to his actual loss." When there is a total destruction of the thing, abandonment is unnecessary. If the loss is so absolute as to be beyond all question, abandonment has little real effect, and the want of it little prejudice. It is in doubtful and questionable cases where it is of importance. But even in these a simple act of abandonment is not to have an independent potency: and Lord Tenterden has shown that the nature of the thing itself is not altered by giving it any particular name. "No artificial reasoning," it was said in the case of *Pole v. Fitzgerald*,* "shall be allowed to set up a Total Loss;"—that is, where it did not exist in itself. But it is useful and has an effect in hypothetical cases. "Abandonment is only necessary," said Lord Ellenborough, "to make a constructive total loss. Where the thing subsists in specie, and there is a chance of its recovery, in order to make a total loss there must be an abandonment." And the same very eminent judge laid down that, "the true effect of a notice of abandonment is only this, that if the offer to abandon turns out to have been properly made upon the supposed facts, which turn out to be true, the assured has put himself in a condition to insist on his abandonment. But it is not enough that it was properly made upon facts supposed to exist at the time, if it turn out that circumstances existed unknown to the parties which did not entitle the assured to abandon."† But it must be added that there are contrary opinions on the subject: and in an old case, *Hodgson v. Blakiston*,‡ notice of abandon-

* Willes, 641; S. C. H. L. 3 Brown's P. C. 131.

† In *Bainbridge v. Neilson*, 10 East, 329.

‡ 1 Park Ins. 400.

ment was held to be necessary, although the ship and cargo had been sold and converted into money when the notice of the loss was received. One great advantage of abandonment is to mark the time and procure definiteness. Park says, the reason why notice of abandonment is deemed necessary is to prevent surprise or fraud on the underwriters.

We have already seen that there are two kinds of total loss :—one absolute,—as by the sinking of the ship ; the other constructive ;—that is, when the ship is swallowed up, not by the waves, but by expenses. In the first case the ship is lost ; in the latter she is *as good as lost*. For if it require me to spend as much to rescue and repair my vessel as it would do to build another of the same size and class, it is really lost to me in a monetary sense ; and in laying out that money I am, as it were, purchasing a new vessel. And if it would cost me *more* to rescue and repair than to build a ship of the value the repaired vessel would have after repairs are completed, it is plain that I should be throwing away my money ; and underwriters cannot compel me to make such a sacrifice. I abandon my vessel because she is in an impracticable place or situation. This indeed is the case with most lost ships. Few ships are actually destroyed compared with the number that sink or are extensively injured : and no ship can be positively annihilated. Loss resolves itself into a question of degree. One vessel, for example, sinks in shallow water, and with expense and the use of proper means can be raised again ; another sinks in deeper water, and no attempt is made to raise her. The difference of one fathom in depth may perhaps thus create the distinction between a total loss and no loss at

all. So the particular situation in which a ship is placed by sea-perils influences my dealings with it. I may be so attached to the vessel that I resolve to spend any money to retrieve her and put her again in repair. On the other hand, I may find the cost of restoration greater than it becomes me prudently to undertake, and I resolve to give up all right in her to the underwriters in consideration of their paying as for a total loss. I give *notice of abandonment* to them. If they accept my notice, they take to the ship and can do what they please with her;—such as she is, she is theirs. Not only the ship itself but all future use of the vessel is theirs;—so that if they succeed in getting her again to sea and making her earn freight, that freight is theirs also. But as the cession of freight to the underwriters on ship affects a third party, that is the underwriter on the freight, it will be necessary to speak on this point presently more at large. If the underwriters refuse my notice of abandonment, I am left to use my own judgment in proceeding. If I am still convinced of the inutility of attempting to get the vessel out of her difficult situation, and of the excessive expense that will be required to repair her, I shall use my discretion and sell her. Then, I shall justify my proceedings with the proper proofs, and claim a loss from the underwriters, and shall make over to them the proceeds of the sale. The circumstance of their refusal of my abandonment will not oust me of my rights, and I shall consider myself acting as their agent in selling the ship and getting home the proceeds of the sale. I have, it is true, my proper duties towards the underwriters in making an abandonment, and so getting rid of my own particular ownership and responsibility in

the ship. I am not to dally and be indecisive: I must determine quickly—that is, in what the law will esteem reasonable time, and the reasonableness will depend on the circumstance of place, means of communication, &c.—what I will do; because my delay terminating in a resolution to abandon, may seriously have lessened the opportunities of the abandonees to save the ship or to do the best with her. Nor must I risk the proceeds of a sale by making use of the money in any speculation, or by allowing it to remain long in agents' hands, or by adopting a circuitous means for its transmission to this country. Should I do any one of these things I should be guilty of *lâches*, and should be held liable for the moneys had and received to underwriters' use.

But an abandonment may be made on mistaken grounds, under a misapprehension that the position of the ship was worse than it really turned out to have been, or from not knowing that the situation of danger was passed and the vessel was again in safety. An abandonment made on invalid grounds is without effect, and neither the underwriter nor the assured is to be bound by it. *The law does not catch men in snares, or make them pay heavy penalties for innocent mistakes.* Like some medicines, it is potent if the disease exist and require the remedy; if there prove to be no disease it is quite inoperative and harmless. So where a ship was taken and abandonment made, but was retaken and was known to be so, before the action was brought, the abandonment did not have effect, because the state of things was different to the underwriter from what he supposed at the time of the abandonment. But if the matter be quite settled before the error be discovered, it is not incumbent

on either party to re-open the settlement. So in an actual case, where after abandonment a total loss had been paid, the owner was not compelled to refund because the loss turned out to be partial, but the underwriter took the salvage himself. And where, in the morning, the underwriters virtually accepted an abandonment of a ship that had been captured, by returning the protest to the broker with the remark that "they were satisfied," which was held to be a sufficient acceptance, but, in the evening, intelligence was received that the ship had been recaptured, Lord Eldon held that they must pay as for a total loss, because they had acquiesced in the abandonment.*

It would not be well, however, to lay too much stress on this decision, because it clashes with that ingenuous spirit which should animate all transactions between man and man, and which has been shown to pervade this difficult subject of abandonment. Here it was clear that even if the expression of the underwriters amounted to an acceptance, which must be considered doubtful, the fact on which it was made was erroneous, and the ship was in safety when they believed her to be lost by capture. Had they not accepted, it is plain from what has gone before, the recapture would have nullified the act of abandonment.

Since an acceptance or a refusal of notice of abandonment does not always require that the underwriter's decision should be expressed in writing, but may, even, be inferred by his acts; and as an assured, after giving notice of abandonment, may by his acts regarding the vessel seem and be inferred to have retracted his abandonment, both parties were often shy in taking any

* *Smith v. Robertson*, 2 Dow, 478.

steps, however beneficial in regard to the ship. Such abstention on both sides was dangerous or disastrous to results. The "Waiver-Clause" was accordingly planned and generally introduced in policies on vessels. It is an agreement that no act taken by insurer or assured for the benefit of the property in question shall be construed as an acceptance or refusal of abandonment. This freedom of action not affecting mutual rights is very beneficial.

With regard to freight. The general statement is that an abandonment of ship to her underwriters gives them the freight as an incident; *i.e.*, the pending freight, or any freight she may afterwards earn. But then, as the freight may be insured by another set of underwriters, it seems a strong and, at first sight, a wrong thing, to give away the subject they have insured, to the insurers of the ship. The court in two early cases manifested a disinclination to look this situation in the face. It was afterwards, in the case of *McCarthy v. Abel*,* specifically discussed, yet even then it was not decided in the affirmative. Lord Ellenborough's judgment in *Sharp v. Gladstone*† is given negatively and with caution. When learned judges are diffident, it is not for laymen to be positive. But in the trial of *Case v. Davidson*,‡ Lord Ellenborough did distinctly state that an abandonment of ship carries freight as an incident. And in the more recent case of the *Scottish Marine Company v. Turner*,§ this principle has been re-affirmed. It is easily conceivable that an underwriter would require a great deal

* 5 East, 388.

† 7 East, 24.

‡ 5 M. & S. 82; S. C. in error 2 B. & B. 379.

§ 1 Macq. H. of L. C. 342.

of persuasion to give up what remained of the freight which he had insured, to the underwriters of ship, who had not insured it. Questions, however, do not arise often on this head, because freight stands in a somewhat different position to ship or cargo. Freight being a sort of profit, is more impalpable than ship and goods. For reasons already expressed, underwriters on freight, in many things, are in a more favourable position than the insurers of other interests; but in respect of a loss their position is rather worse; for theirs is the only interest (except profits and commission) which is affected by the loss of the voyage. In former times the "loss of the voyage" was very frequently mentioned, and was often brought in as a test of the existence of a total loss; but latterly the consideration of it has been discarded when the question relates to the ship; yet it is important with regard to freight, profits, and commissions; for in these interests the loss of the voyage is the loss of the interest itself.

The position of freight affected by an abandonment appearing so unsatisfactory, the subject requires a little further consideration. It has been stated above that freight being an inseparable incident of the ship passes with the ship to the abandoner. We can even reconcile this to our minds, with a little difficulty, by considering that if a *house* were made over to us we should look for all future rents derivable from it,—otherwise the assignment of the tenement would be futile. But we are met by a more formidable obstacle to the acceptance of this principle when we find that the tendency of decisions is, that not only all future freight is to pass to the underwriters on ship when abandoned, *but also what has already*

been virtually earned but not paid ; so that if nine-tenths of the voyage were accomplished when the vessel was abandoned, the ship underwriters were nevertheless entitled to take the whole. Arnould thus sums up the subject : “ The result, therefore, of the English jurisprudence on this point must be taken to be, that in case of separate insurance and abandonment of ship and freight to different sets of underwriters, the underwriters on freight take nothing by the abandonment, but *the whole freight pending at the time of the casualty, and ultimately earned by the ship on arrival, is transferred to the abandonees of the ship as an inseparable incident thereto.*” * Now if this is the case, it seems to follow that freight must cease to be a separately insurable interest, because it has, under this view, no individuality apart from the ship itself, being its “ inseparable incident.” It is an emanation from the ship : it is as much a part of the vessel as one of her masts is. We could not with benefit insure the main-mast of a ship when the ship is herself insured, because, in case of a sale, the underwriters on the latter would certainly claim and receive the proceeds of the mast, and leave nothing for its separate insurers. It is in this anomalous position that freight is placed, and we are in the following dilemma : If the underwriter on freight is subject to have his interest given away from him to a set of persons whom he never contemplated, but whose rights are held to be paramount to his own, then a new risk arises on a

* Page 1149. And for support of this view he quotes *Case v. Davidson*, 5 M. & S. 82 ; *Miller v. Woodfall*, 8 E. & B. 493, seems to point rather the other way ; but there were special circumstances in the latter case.

freight policy—that of “peril of underwriters.” If, on the other hand, the underwriter holds fast to the freight which has been earned, but not yet paid, as an asset of his policy, whilst at the same time the abandonee of the ship also claims and receives it as a beneficial incident of his interest, we have the absurdity of a shipowner giving away the same thing twice,—that is to two sets of claimants each of whom has a right to it, and he has to account to both for a sum which only exists singly.

This is one of those cases where in order to support a principle once laid down, an inconsistency, if not an injustice, is created in practice. The dictum is that “freight is an inseparable incident of the ship;” and to carry out the ‘bookish theorick’ the right of another class of persons is invaded, or the insured owner has absurdly to pay the same sum twice over.

If we follow where this principle leads, we are brought to another perfectly logical conclusion; viz., that since freight is an inseparable incident of the ship, the circumstance of there being insurers of ship is of no consequence, it not being their incident but the ship’s. It is personally theirs by transference, if they have insured the ship and accepted an abandonment of her from the owner; it is personally the purchaser’s if the vessel be not insured: but in neither case can it belong to the underwriters on the freight itself, because it is part and parcel of the ship. Although this is a correct inference from the premisses, it is to be doubted whether any one would seriously commit himself to the conclusion.

An important cause was tried in the Court of Queen’s Bench, embracing the whole subject under discussion. The judgment of the Court was delivered by Lord Campbell,

C. J., in *Miller v. Woodfall*.^{*} A ship in her owner's employ had arrived at Southport, in the river Mersey, on a voyage from St. John's to Liverpool. She was stranded and abandoned at Southport. Inasmuch as the use of his own ship by the owner gives rise to no contract of freight,—for a man cannot contract with himself,—the only freight which passed in this instance was what could be gained by carrying the cargo a few miles from the stranding place to Liverpool: but Lord Campbell lent all his weight to the view which gives away the freight to the abandonee of ship. It was urged by counsel that only incidental freight passed with the ship, and that as no contract runs with a chattel, freight which by charter is only due at the *terminus ad quem*, the port of delivery, would not so pass. Admitting this, the Lord Chief Justice said, “If the goods on board the ship at the time when the casualty to which the abandonment refers occurred had belonged to third persons, for whom they were to be carried on freight from St. John's to Liverpool, there can be no doubt that by our law the right to the whole of that freight would have passed to the abandonees of the ship.” This decision seems to support the strongest view possible in favour of the abandonee.

In a late case heard before Mr. Justice Day, *The Sea Insurance Co. v. Haddon and Wainright*,[†] where freight was claimed by underwriters who were the abandonees of the ship, the learned judge decided against them, on the ground that their demand was unreasonable; since as they had not insured the freight they had no right to be

^{*} 8 E. & B. 493.

[†] M. M. Reg. 22nd March, 1883.

beneficiaries in what part remained of that interest. The reasoning is unobjectionable, and it coincides with the writer's notion of right; yet it must be owned that the ruling conflicts with the majority of decided cases.

Where there was a loss of the subject-matter of the insurance, the more important and more hardly contested case may here be mentioned, of *Burnand v. Rodocanachi* (Appeal, 7th March, 1881, *Times*, 8th March: House of Lords, 11th July, 1882, *Times*, 12th July). Here the ship insured had been captured by the *Alabama*, and the underwriters paid for her loss. Subsequently the United States Government distributed for compensation a sum much larger than the interests insured, and the underwriters claimed to have the whole amount, which they looked upon as a salvage, paid to them. They did not, however, in this case succeed, as the argument prevailed that the excess amount of compensation was a voluntary gift to the original sufferers, and not the right of the underwriters.

To sum up what has been said, in a few words, abandonment is a useful preliminary step which the assured very frequently takes on first intimation that his ship or other property is lost or is likely, from the circumstances in which it has been placed by sea-perils, to be lost. It is inoperative if the loss be actual—for then no abandonment is necessary: and an actual loss may either be that the property has absolutely disappeared, or is in a completely wrecked and altered condition, about which no question is entertained; or it may be, according to several cases, when such property is so loaded with expenses, or so out of the power of the assured, as to be

effectively lost to him. But an abandonment is also inoperative if made in error or under false pretences, when an apparent or an impending loss does not really exist. If an abandonment be made when there are not valid and sufficient grounds, and the underwriters refuse to accept it, the notice or act of abandonment does not alter the former position of the two parties: it does not convert a partial loss into a total loss, or clothe the assured with any fresh power against the underwriters: the *status in quo* remains, and whatever claim there may be on the policy will have to be decided on the merits and circumstances of the case.

Abandonment is effective and useful in cases in which the result is unknown or uncertain. It is an option offered to the underwriters in circumstances of which the event is doubtful. They may by accepting it take over the article so renounced to them, and under their own decisions and instructions do better for themselves with the property than if it remained in the disposal of the captain, owner, or agent. Or they may reject the abandonment: in which case their liability will be determined by the absolute result when known, or by the decision of an action at law brought after abandonment has been made. In many cases it is useful in affixing a date to the putative loss.

In thus placing the principal features of abandonment in a simple form, it must not be supposed that the subject is free from difficulties. Its effect is to invest the underwriters with the property and liabilities of the assured in respect of the thing insured; but a mass of law may be collected as to the revocation of abandonment, and what acts, if any, constitute a tacit acceptance by under-

writers, or a tacit annulment of notice by the assured. As the mutual fears of the two parties to an insurance often tied the hands of each and led to the sacrifice of property, the useful clause, described above, has been inserted in most carefully drawn policies, to the effect that no steps taken for the saving or preservation of the property, either by the assured or the underwriters, shall be deemed to be either a waiver or an acceptance of a notice of abandonment given.

The Right to Abandon.

We have now to consider what circumstances give the assured a right to abandon his interest to the underwriters. Before we seek the support of leading cases to bear out the several positions taken, it is well to obtain a general outline, by looking at the subject from the rising ground of common sense and our ordinary notions of propriety and justice. The position of the underwriter towards the assured is, that for a certain payment or premium, he undertakes responsibilities which would otherwise fall on the merchant or owner who wishes to be insured. Under stated limitations he agrees to stand in the shoes of the assured and to indemnify him against loss affecting the interests insured. Strictly speaking insurance is a wager between the two parties, grounded upon probabilities, having for its subject some valuable interest, recognized by law, and highly conducive to the welfare and expansion of commerce. Nevertheless, it is of the nature of a bet, and it must sometimes be construed with the same spirit in which "debts of honour" are looked upon. Thus the *benefit* of the interest insured must be ever kept in mind, not the bare substance of the

thing insured only. If, from circumstances coming within the scope of the policy, all benefit is lost to me in my ship or goods, the underwriter has lost his wager, even though some or all of the subject-matter remains *in esse*. And if there is a high probability that the thing itself, or all benefit to be derived from it, will cease before it reaches its destination, owing to perils insured against, I may abandon my interest to the underwriter, giving him the opportunity, as far as I can, of taking any course he chooses with the property, to turn it to some value. An abandonment always conceives some degree of option. The underwriter may or may not accept. If the work of destruction has proceeded very far, or its progressive result is very certain, I have no occasion even to abandon, that is, to give notice to the underwriter. He will be equally obliged to pay a total loss without such notice. But if I am doubtful, undesirous to take the risk of results; if I find no means to get away my ship or to bring home my cargo; if I know that attempts to do so will involve me in expenses greater than the after value of the thing saved, I have a right to throw my burthen on the underwriter and *sell*, as it were, all my interest to him,—the price being the loss he pays me. If he accepts the abandonment he will give his own orders respecting the property which has thus become his own, and then the arrangement made is binding, and he cannot make me retire from it, though circumstances should afterwards occur by which I might again acquire the property back less injured or less hampered by expenses than I had previously imagined. If the underwriter will not accept, my course is not so unembarrassed, yet my right of recovering a total loss

eventually may not be injured by his refusal. But I must act more on my own responsibility. I may still decide on cutting the adventure short instead of continuing it, and may fall back on my rights founded on the particular merits of the case. There will, however, be this difference in the effects upon myself, I may have to bring an action against the underwriter; and in that case I shall have to show that the same state of things continued to exist up to the time of action which operated at the period when I first gave notice of abandonment. Should the circumstances have changed for the better during that time, my right to abandon may have ceased, and I might have no chance of succeeding by law to enforce my claim for a total loss. An embargo which had placed my interest in a hopeless detention might have been taken off before action; the ship which had been captured might have been recaptured and taken into a friendly port; the vessel which seems bilged and fixed on rocks might unexpectedly have been got off in that interim, and in a less injured state than was supposed. And thus my position with the underwriter may have been changed, and my supposititious right to a settlement as for a total loss, may have subsided into a demand for an average loss only.*

There has, it must be owned, been a considerable difference in opinion about abandonment; and Lord

* See *Kaltenbach v. Mackenzie*, as to necessity of giving notice of abandonment; appeal 4th June, 1878, 3 C. P. D. 467; and *Shepherd v. Henderson*, H. of L. 1st December, 1881, where notice of abandonment was given; but underwriters' agent got the ship off, at an expense of £1400, and her subsequent value was £6000. Judgment for underwriters.

Mansfield said, "No right of the assured can vest as for a total loss till he has made the election to abandon."* This is at variance with what has been just mentioned as to cases where abandonment is not necessary; but in so speaking, he had not in his eye those absolute total losses where the object insured has absolutely disappeared or been destroyed. War had given a complexion to the decisions and habits of thought of that day; and when judges spoke of total losses they usually had in their eye the very frequent occurrence of capture. Capture was a risk that brought the insurance to which it applied still more nearly into the category of wagers; and the property lost by capture was not destroyed but had got into other persons' possession, from which there was still the possibility of its being rescued and of its revesting in its original owner. It was necessary, therefore, to have precise and stringent rules for determining this sort of total loss. For the assured was not to have it in his power to throw the onus, at his pleasure and at any time, on the underwriter because he saw that his adventure was likely to prove unprofitable to himself. The notice of abandonment must, therefore, be given in reasonable time,—this will be more particularly spoken of in the last section: and it must be given when the assured has information of what appears to be constructively a total loss; for, said Justice Buller, in *Cazalet v. St. Barbe*,† "there is no instance where the owner can abandon unless at some period or other of the voyage there has been a total loss." He means *constructive total loss* in this sentence. And so if an owner do not elect to abandon till the peril is over, he has no right to

* Park, p. 352.

† 1 T. R. 187.

abandon when the thing is safe. This seems too plain to require any comment.

If between the times when notice of abandonment was given to underwriters on news being received of the supposed loss of a ship, and the bringing an action for the amount of the policy, information be brought of the ship's safety, the underwriters are excused from paying a total loss. The property reverts in the owner though there have been an interruption of possession; and the English law does not recognise any change of property by capture till the ship or goods have been condemned. The same seems to be the case where a derelict is picked up and restored to owners. An abandonment which would have enabled the assured to recover as for a total loss could not be insisted on where before action brought the state of things was changed. On the other hand, if there be no repossession of the captured property before the action be brought, the abandonment stands good and the underwriters will be adjudged to pay a total loss.

A good capture, and even an embargo, give the assured the right to abandon immediately to his underwriters and commence action. Steps taken to recover the property would be commenced in the interest of the underwriters, and should only be undertaken by the assured at underwriters' request, and in the character of their agent; lest the latter should plead that the assured had by acts withdrawn his abandonment and taken to the property previously ceded to his insurers. The *Waiver-clause* mentioned at the close of the preceding section prevents this danger and precludes the fear of it.

Although one general principle binds both ship, cargo, and other interests in respect of abandonment, there are

practical distinctions affecting different interests which are very striking. A ship may be abandoned when she has completed her insured voyage, and arrived at her place of destination, and even entered an inner harbour or dock, if it be found that the repairs required to restore her to the state she was in before encountering sea-perils would exceed her value after repairs: or, to try it by another test, if they would be greater than a prudent uninsured owner would undertake in the circumstances. This was held in *Allen v. Sugrue*.^{*} But the same course is not open to the assured in the case of cargo. Whether the goods are insured free of Particular Average or are subject to Average, so long as they arrive at their destination *in specie*, however great their damage, and though it be apparent that on freight and charges being paid on them no value will remain, or, it may be, that the merchant will be left in a loss by excess of charges over value, he has no right to abandon the goods to his underwriters. He cannot convert by a notice of abandonment his partial loss into a constructively total one. This, however, is not the case where the goods are landed at an intermediate port, and an estimate is made of their comparative value and the charges on them; see *Meyer v. Ralli*.[†] As the owner of goods (not being merely a consignee) cannot throw his damaged merchandise on the shipowner's hands at the place of destination, in part payment of freight, when the payment of freight would exceed their value, neither has the insured merchant the power of throwing his commercial onus on his underwriters. Yet the very same test, of "the play not being

^{*} 8 B. & C. 561.

[†] 1 C. P. D. 358.

worth the candle," should apply to goods as well as to a ship; and the argument be just as cogent, that a prudent uninsured merchant or consignee would renounce the goods so damaged and hampered by freight and charges, if he were able. That we find a different rule, an arbitrary distinction made, in the two parallel cases, is one of those inconsistencies in the "Law Merchant" which we may regret to observe, but must for the present accept.

If, on the other supposition, the goods shipped arrive in another form at their destination—their characteristics and use destroyed, and their substance converted into a nuisance, the inference is from cases, and especially from *Roux v. Salvador*,* that a total loss is established notwithstanding such arrival; and in this event that no abandonment is necessary, but the assured may proceed to recover their loss, which is absolute as well as total. Indeed it would be prudent for underwriters to refuse, under such circumstances, an abandonment if made to them; lest they should be in the position of not only paying a total loss on the interest insured, but also have the additional expense cast on them of having to destroy the material, or convey it to a distance to throw it into the sea or otherwise get rid of it.

Two formulæ are now established by law to test the assured's right to abandon his ship on the ground of its being constructively lost:—1, whether the cost of and attending her repair would exceed the ship's value after repairs; 2, whether a prudent uninsured owner would undertake those necessary expenses, or would decide to sell his ship.

* 3 Bing. N. C. 266, reversing *idem* 1 Bing. N. C. 526.

Some persons have supposed that these two tests are the same; or rather, that the first merges into the second. A little consideration will, however, discover a material distinction between the two. Both depend on opinion. The former is simple, and refers principally to the estimated cost of repairs, and the estimated value of the ship when she is again in a position to continue her voyage. But as the test may be applied at the termination of a voyage, it would be better to say, her value when restored to the same condition she was in before receiving damage. The second is more comprehensive and more complex; and it cannot be answered without taking into view the surrounding circumstances; as, for example, the freight the owner will make if he can complete his voyage; and what contribution, in some cases, towards expenses may be procured from the cargo, &c.

The question of freight appears to have been too little considered in deciding on a loss by this test. And the more we look upon freight in the character which the law gives it, of being an incident of the ship, the more inseparable it must seem from the vessel in such a calculation. Why it is left out of sight so frequently is that the freight itself being insured, the constructive loss of the ship produces a total loss of freight and a quick recovery on the policy of a larger sum than the completed voyage could give. It is quite certain that the fact of freight being insured is an efficient cause of many ships being abandoned and sold at foreign ports, which would have gone to sea again had there been no such insurance. A strong motive is absent for determined exertions to repair the ship; and an owner's interests

are best consulted by "a masterly inaction." To apply the rule, then, with effect, the question put should be: How would a prudent owner, uninsured both on ship and freight have acted? And if the answer to this enquiry proved to be that he would have abandoned the voyage and sold his vessel, then there would be little doubt as to the liability of an underwriter on ship as for a total loss. In *Potter v. Rankin** the subject of freight as an element in estimating the relative amounts and deciding on what a prudent owner would do, is to be argued. A rule was granted for a new trial by the Court of Common Pleas in January, 1867.

Another motive—we are here dealing with motives, and the law, contrary to its usual practice, prescribes in these cases motive as a rule—another motive in an insured shipowner's mind, in which it would differ from that in the deliberations of an uninsured owner, is that the former, by repairing his ship, has to pay, usually, one-third of the cost of repairs for melioration, whilst by a condemnation and sale he receives the entire value of his vessel from the underwriters.

But in deciding on an owner's right to abandon to his underwriters, some farther considerations have occasionally to enter into the estimate. There may be other expenses besides those of repairs involved in saving a ship from apparent or impending loss, and restoring her to a state of navigability, and to these the cargo and freight may have to contribute their quota. This was the case in *Kemp v. Halliday*,† and is a leading cause on this subject. It was argued first before the Court of

* L. R. 3 C. P. 562; 5 C. P. 341; L. R. 6 H. L. 83.

† L. R. 1 Q. B. 520; 6 B. & S. 723.

Queen's Bench, and afterwards (May, 1866,) in the Exchequer Chamber, which affirmed the decision of the Court below. The ship *Chebucto* had sunk in Falmouth harbour, with part of her cargo on board. The argument for the shipowner was, that the expense of raising the vessel and the cost of repairing her would have exceeded her subsequent value. In making this estimate, the owner claimed to leave out of sight that when the vessel, containing part of her lading, was raised, those goods and the freight on them would contribute towards the expense of floating her; and that a prudent owner, uninsured, would have elected to sell the ship as she was, and not to have entered on the expense of raising and repairing her. But the defendant argued that the cost of raising the vessel was a joint expense, and not exclusively affecting the shipowner; and that the quota payable by cargo and freight could be estimated as well as any part of the estimates; and that when those quotas were deducted from the sum total of expense, the ship's residue would not exceed her value after repairs: consequently, that on application of the rules now under consideration for determining an assured's right to abandon and recover a total loss, the shipowner was not in a position to abandon, or to claim except as for a General and Particular Average. By the judgment of Chief Justice Earle and five judges, the principles thus stated have become law.

Even where there has been a valid right to abandon at one period, the assured may by his own act abrogate that right, and with it his power of claiming a total loss. Thus a ship which had been captured, carried into a port and sold—and at that moment she was to all intents

totally lost—was bought back by her captain on the owner's account, it was held that, by so doing, the loss had been changed from a total to a partial one. Still less will a transient interruption of ownership, a parenthesis in possession, as, for instance, a temporary capture followed by restoration of the property, the latter fact becoming known at the same time as the intelligence of the capture, afford ground for an abandonment.

On the opposite side there are cases where the mere restoration of the thing insured will not act to defeat assured's claim for a total loss. So where a vessel had been captured and recaptured, and was brought into port, but with a salvage upon her of fifty per cent. and other expenses, the circumstance of such restitution did not take away the owner's right to abandon. To make this precedent applicable to other cases, it would now be necessary to show that the needful repairs together with the salvage and other expenses would exceed the ship's value after repairs.

It is not the mere possession of a policy that confers the right on the holder to abandon the property insured. A person with whom a policy had been deposited as a security cannot claim such right.

Abandonment of Goods.

It is of the highest importance to define under what circumstances abandonment may be made with regard to goods, because by it a still greater change of position is effected than is made when the subject is a ship. When goods are insured "free from Particular Average," the right to abandon, if it can be established, and the sale at an intermediate port following, throw

that loss arising from sea-damage upon the underwriters, which without the name of *total loss* would have had to be borne by the merchant. As the power to claim on a "memorandum cargo" is therefore somewhat in the choice and will of other persons, it is most necessary to see that a sale was obligatory from the circumstances, and that the stated necessity for selling was neither factitious nor fictitious. There is no ground for abandonment of cargo as affecting underwriters unless the cause primarily be that of sea-perils. However subsequent circumstances might increase the loss, it must originate in the perils undertaken by underwriters, or it will not form any claim on them. Thus, the natural heating of a cargo of grain, even when it occurs through protraction of the voyage by contrary winds and unfavourable weather and be followed by the sale of the grain at an intermediate port, will not substantiate a demand for loss against underwriters. On the other hand, if sea-damage have attacked such a cargo, and supervening circumstances render the sale of the whole of it necessary and prudent, the position is changed. Detention alone of a cargo, though long, does not give generally a right to abandon; because underwriters are not concerned in the rise and fall of markets, but in the safety of the thing itself; so that if it were to take a whole twelvemonth to repair a ship and make her ready to carry home her cargo which had been discharged at an intermediate port, underwriters would refuse an abandonment, and would give as their reason, We do not care in what time the cargo we have insured reaches its destination, be it long or short, so that it arrive at last. But an embargo, or any deten-

tion of kings, princes, &c., which becomes protracted and presents no prospect of its being taken off, gives a just ground for abandonment. So too if a ship meet with great damage and is obliged to resort to a port of distress, and there the cargo is landed and the ship obliged to be sold, there is a moral obligation on the master, but not a legal one, to endeavour to hire other shipping and to send forward the goods; but if it becomes a matter of impossibility to effect this—if there are no means of forwarding the cargo, then, even though the goods are themselves sound, they may be abandoned to the underwriters; because through circumstances originating in sea-perils insured against, the cargo has been left in such a situation that the owners of it cannot get possession of it, and it is as much lost to them as if it were at the bottom of the sea, or in any other impracticable place. And if, again, the cargo has been damaged, and it can be shown in a demonstrative manner that to re-ship it would be to bring about the entire loss of its value before it could reach its destination, that is a ground for abandonment; and if, as in *Roux v. Salvador*,* the progress of destruction be going on so rapidly, that before a communication could be made with the parties in England and their orders be returned the decay would become complete and be a danger to the community, and therefore a sale be resorted to without communicating, even an abandonment is unnecessary. Or on goods subject to Particular Average, though they were in a comparatively safe place, yet were in a vessel that was leaky, and would have to remain so for many winter months, and were certain not to arrive at the time at which they would

* 3 B. N. C. 286.

be at their highest value, all these circumstances taken together were held to be a valid ground for abandoning the interest to the underwriters.

In the two leading and well-known cases of the *Bombay (Great Indian Peninsular Railway Co. v. Saunders)*,* and the *Plantagenet (Booth v. Gair)*,† the doctrine of constructive total loss and of abandonment comes in only incidentally, and, as it were, obliquely. In each instance the subject-matter of the insurance was warranted “free from Particular Average:” it was iron by the former vessel, and bacon by the latter. The whole of the iron finally reached its destination by transshipment in another vessel; part of the bacon also arrived at its intended terminus by two tranships, and it was admitted by the plaintiffs that a constructive total loss could not be claimed. In both cases the question resolved itself into one of charges, and especially of the incidence of the second freight rendered necessary by the inability of the original ships to complete their intended voyages. And though both results were the same, that the underwriters were not responsible for the second freight on a policy warranted free from Particular Average, yet by an *obiter dictum* the Judge admitted that had the second freight and charges necessary to bring the goods to their place of destination exceeded the value of the goods there would have been a constructive total loss and a case where an abandonment might have been made.

These important cases should be considered more in detail, and be read in connection with a later case now to be mentioned. In the *Great Indian Peninsular Rail-*

* 1 B. & S. 41; S. C. in Cam. Scacc. 2 B. & S. 266.

† 15 C. B. N. S. 291.

way Co. v. Saunders,* the subject-matter was iron rails. They were insured "free from Particular Average," and the freight had been paid on them in advance. The ship met with damage, put into an intermediate port, and was there condemned and made a constructive total loss. The rails were sent on by other vessels, and a second freight had to be paid; but this and other charges did not consume the entire value of the goods at their destination. It was shown that the rails might have remained without loss or damage for years at the port where the ship had put in, till means for sending them on were found. Here there was held to be no total or constructive total loss; nor would the Court allow the excess of freight which arose by the forwarding the rails by other vessels.

Booth v. Gair,† often called the Bacon case, in consequence of the subject-matter of the insurance, followed. The bacon was landed at Bermuda, where the vessel had put in, and where she was condemned. Part of the bacon was damaged and was sold there; another portion was sent forward and arrived at its destination. Here, again, there was no constructive loss. It would have been the reverse if all the bacon had been found damaged, and with increasing decay, so that in the opinion of surveyors best versed in the article it could not have arrived at its destination *in specie*, or even in such a condition that its sale at Liverpool would be sufficient to pay freight and charges out of proceeds.

A case which succeeded the foregoing, *Meyer v. Ralli*,‡ is interesting and important. It is, however, made

* 1 B. & S. 41, and 2 B. & S. 266.

† 33 L. J. C. P. 99.

‡ 1 C. P. D. 358.

rather intricate by some subsidiary questions which arose, viz., the conduct of the shipmaster ; the binding effect of a French judgment on English underwriters ; whether the whole freight or only *pro ratâ* was chargeable at Rochelle, the port where the ship put in ; the not giving bail by the assured ; and the “ suing and labouring clause.” The *Unico*, with a cargo of rye, bound for Schiedam, encountered sea-perils, and was conducted into the port of Rochelle, in France. Her cargo was discharged ; part of it actually damaged, was sold ; the rest was put into granaries, was cooled and restored to good condition ; but no efforts were made during nearly two years to forward the cargo from France to Holland. An abandonment had been made to underwriters and refused. Stripped of the difficulties which lead away the eye from the main points, the result was that the portion of the rye which was sea damaged and was sold, being a mere Particular Average, was excluded from the case, except as to some charges of separating the damaged rye from the sound, which was necessary even for the well-being of the latter portion. A calculation of value and expenses was then made, and it appeared that if the warehouse rent and other charges, including the airing and conditioning (which were held to be “ suing and labouring ” charges), and the full original freight, together with the forwarding freight to Schiedam, were ranged against the proceeds of the rye if sold at destination, there would have been a constructive total loss, inasmuch as that all these expenses would have exceeded the proceeds of the sale. But it proved that the French court was wrong in saying that the whole freight by the *Unico* should be exacted, for only the *pro ratâ* freight

was due. This single reduction of expenses left a surplus of proceeds over charges, and a loss was not recoverable on the policy of insurance.

It is rather unfortunate that under the name of Particular Average are included both loss or deterioration of the article, and also expenses caused or rendered necessary by sea-perils. It had been laid down by a judge, and restated by legal authorities that there exist but two descriptions of average, viz., General and Particular Average. This may be accepted as a rough generalization, but in a more exact sense it is inaccurate. The diminution or depreciation of the subject-matter must be distinguished from the charges which fall upon it. To bracket these two things in a single term is an error, or leads to error.

A second error consists in supposing the object of marine insurance to be the mere physical safety of the thing insured; whereas it is actually the safety and arrival of the specified object at a specified terminus. So in the definition already given of constructive loss: *that* may take place if the object insured is removed by certain causes from the power and control of its owner, the assured, although it may be known to exist in physical safety. If goods though imperishable and declared free from average were, in consequence of sea-perils and for their physical safety, landed on a barren rock in mid-ocean, where they might remain unchanged and untouched for an indefinite period, yet if their place of security be inaccessible, or accessible only at an expense exceeding the value of the goods, they are constructively lost, and would be claimable on a policy which, in the common form, insures them on a voyage from A to B, and keeps

the underwriter's liability alive until they be safely landed at B. And this parallel but extreme case requires to be considered in deciding on the *Bombay's* or any similar instance, in which by "suing and labouring" and the payment of additional freight, the merchandise is taken from an intermediate place, where it stagnates in physical safety, to a place designated in the policy, at which place it acquires its value and by arrival there discharges the underwriters from the responsibility they undertook.

It is to be hoped that the first of the two erroneous principles just mentioned has since the judgments given in the *Bombay's* case, in *Booth v. Gair*,* and *Meyer v. Ralli*,† received its death blow, and it has been admitted by the judgment of the Court in *Kidstone v. Empire Insurance Company*‡ to be untenable. Referring to the opposite proposition, Justice Willes spoke of it as "in accordance with the views of the London Average-staters, which favour a distinction between loss and damage to the thing insured, and expenses incurred in its protection," &c. And he afterwards added, "If necessary, we should have been prepared to hold that the evidence (produced during the trial) established such an understood meaning, according to which Particular Average does not include particular charges." A later opportunity will be taken for speaking of transshipping expenses.

* 15 C. B. N. S. 291.

† L. R. 2 C. P. 357.

‡ 1 C. P. D. 358, 373.

Suing and Labouring Charges.

A sentence which has always formed part of the common form of Lloyd's policy, and was not much considered or depended on, has of late years grown up in importance, and has been made the ground for much discussion. The words are, "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandize and ship, &c., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers, will contribute," &c. The first part of this clause is permissive, and makes it legal for the assured and his agents and employés to do all that seems beneficial for ship and cargo, without prejudicing their rights under their policy of insurance. In this it resembles the Waiver Clause of more modern times; only the latter agreement is mutual, and permits both assured and insurer to assist and act, without such interference being construed as an inference of acceptance or withdrawal of a notice of abandonment. It would rather appear as if at the time the policy was drawn up, the right to assist, rescue, or preserve a vessel in danger was looked upon as exclusively in the insurers; and that the duty and privilege of such defence and rescue were theirs only; the property when in peril seeming to pass to them, as being, in fact, at their responsibility. Then comes not only the admission by underwriters that intervention on the part of the assured shall not derogate from their legal rights, but an engagement that the

insurers will contribute to the costs and expenses so incurred by the assured.

Great efforts are often used now to make these words cover various charges which were formerly not thought to be contemplated by them. Thus in *Meyer v. Ralli*,* the expenses of separating the damaged from the sound rye (a free-of-average cargo), and of bringing and keeping the latter in condition, were held claimable from underwriters under the "sue and labour" clause, strengthened by, or perhaps grounded on, the fact that had the condition of the rye been allowed to get a little lower, the expenses would have exceeded the proceeds of sale, and a total loss on policy would have resulted. It was impolitic to refuse the cost of the instrument which was the means of averting a total loss.

It has also been assumed by some that General Average in its entirety comes under the term "suing and labouring." This is a mistake, and the Courts do not take such a comprehensive view of these words.† It must be assumed that these two words, the meaning of which is different, and not merely a redundant parallelism, take in the acts of the owner or assured, whether in asserting and following the rights of interests in danger, or working and expending money for the benefit of those interests, although not authorized to take such steps by the insurers, nor acting as their agents. Proceeding thus, the assured are within their rights by the policy, and can demand to have their expenses repaid them, and, at times, their successful exertions rewarded. A crucial test of this clause would be the assistance given by a

* C. P. D. 9th May, 1876.

† See *Aitchison v. Lohre*, 4 App. Cas. 761.

steamer by towing or otherwise aiding another steamer in danger or distress belonging to the same owner. Throwing aside the theatrical bombast about one British seaman always holding out the hand to a brother Salt in trouble, the owner in such a case "sues, labours and travels, for in and about the defence, safeguard and recovery" of the property, and when successful seems to merit a recompense.

On Freight.

If freight be abandoned, and the ship be repaired and take a new freight in lieu of the first, the underwriters are entitled to the benefit of such substituted freight. And with regard to freight, which being a more unsubstantial subject of insurance requires more nicety in dealing with it, there are times when an owner may find it necessary to give up freight upon arrangement, or when, it may be, on calculation preferable and judicious to do so; but an act which is indirectly beneficial to him is not always to affect the interests of other persons. Thus, there may be an opportunity of abandoning the voyage and foregoing the freight, and it may be the most saving course to the owner to take, who may see that by continuing the voyage the wages and other expenses of it will inevitably consume it and more. In such case a happy termination to the voyage is the contingency most to be dreaded by him. If then there be some colourable pretext for considering the voyage broken up, and an abandonment made to the underwriters, the motives must be very carefully examined which led to it; always remembering that with a fully-insured freight a total loss is the most profitable thing that can happen;—much

more so even than the fulfilment of the prayer in the bill of lading, that "the good ship may be sped to her desired port in safety."

If, on the other hand, from perils of the sea the vessel seeks a port of refuge and is unable to complete her voyage, or could only go to sea again at so great an expense that an uninsured prudent shipowner would not undertake to enter on such an outlay, then there is good ground for abandonment of the freight to the underwriters. They will then have the option of seeking means to bring home the cargo from the port of distress ; and if they can do this at a less freight than the contracted rate by charter-party or bill of lading, they may make a saving on the total loss they pay. If, however, the port of distress where the ship takes refuge is far distant from the underwriters ; if expenses are increasing rapidly by delay, or other circumstances render more immediate steps necessary, the master may then break up the voyage, and the loss of freight will become payable by the underwriters, though no abandonment of the interest were made to them,—in the difficult circumstances described, the captain is invested with, or rather is forced into, the character of agent to all the parties concerned ; he is subrogated into the place of persons who are absent ; and, as such agent or surrogate, so long as his acts are not fraudulent or violently injudicious, the acts of the master are binding on the several parties concerned. Nor are his acts to be construed against the interest of himself or his owners. The policy of insurance makes it "lawful" to him "to sue and labour," and the most reasonable explanation of this expression is, that such acts, being lawful, shall not be construed against himself

and owners to the defeating their right of abandonment and claim for total loss.

The whole matter of loss of freight, and the character of the master's acts at a foreign port of distress, are gone into in the important case of *Kidstone v. Empire Marine Insurance Company*.* The ship *Sebastopol* put into Rio Janeiro, where, owing to the damages she had sustained at sea, and the impossibility of repairing her except at a cost greater than her value, she was condemned and sold. The freight was insured, and the action was on the freight policy. The master, whose prudence and good faith in the transaction were not questioned, found the opportunity of sending the cargo on to its destination by another vessel; and from Rio, the rate of freight being less than that from the Chincha Islands, he consummated his original contract of affreightment as regarded the cargo, and secured a saving as respected the freight of some £400. The freight had been insured "free of Particular Average," and the insurers defended an action on the policy by the plea that there was neither a total loss nor a constructive total loss of freight. The Court gave judgment against the defendants. It may seem strange that any difficulty should have arisen in arriving at this decision, and that it should have been found necessary to invoke the "sue and labour clause" as a solution. Stated in its simplest form, the case was this:—By the condemnation of the ship at Rio a total loss of freight took place then and there. The master, now invested with the character of agent, both generally, and specially to each of the interests, by a wise and prudent decision succeeded in effecting a saving to the

* L. R. 2 C. P. 357.

underwriters of freight. They endeavoured to turn this proper act of the master against the assured, and to show that by that act a claim as for total loss of freight was waived. In the discussions on this case and the cases of the *Bombay* and the *Plantagenet*, a short, and previously almost unnoticed, clause in the Lloyd's policy has been raised into prominence, and developed into a meaning and importance apparently little foreseen by its authors. The clause reads thus: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, and ship, &c., or any part thereof, without prejudice to this insurance, to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of his sum herein assured." In this clause two things are noticeable: that "suing" (which in this place is understood "doing work," and not simply suing at law), "labouring and travelling," are made *lawful* to certain persons acting in lieu of the assured, and that to such expenses of suing, &c., the underwriters agree to contribute their shares. But what is the *unlawfulness* from which this clause releases the assured? I believe the great majority of thinkers will agree that the expression means, that by the acts of the persons mentioned the assured shall not be prejudiced in any claim which he might otherwise have had on his underwriters. Such steps must be supposed to be generally beneficial, and are not to act against the rights of the assured. To embody this view, and to make it equally available to the underwriter, a new clause, already mentioned more than once above, has been intro-

duced into policies of insurance to the effect, that no acts taken by the owner or the assured for the saving or benefiting of the interest shall be deemed an acceptance or a waiver of an abandonment. At the risk of some little repetition this position is re-stated.

In the *Bombay's* and *Plantagenet's* cases there was ground for a discussion whether the underwriters, by this provision, were or were not bound to pay the expenses of carrying on the iron and the bacon to their destination; scarcely so in the *Sebastopol's* case, because the effective loss of freight had already taken place, and the master was afterwards acting for and on behalf of the underwriters, and was doing his best to avert from them the whole money-consequences of that total loss.

In *Tellefsen and Others v. Owners of the Cito*,* the vessel had been abandoned, was picked up derelict, and taken into Plymouth. Her owners, supposing that the property by being safe in a port reverted in the original proprietors, desired to carry on the cargo to its destination, and by completing the voyage obtaining payment of the freight. The owners of the cargo claimed to have the goods given over to them at Plymouth, without payment of freight. The Admiralty Court sanctioned this course; and the Court of Appeal confirmed the decision of the Judge in Admiralty. The ground stated by the Court was that by the abandonment of the ship, *without the intention of retaking possession*, the ship-owners had abandoned the contract of affreightment, so as to give the cargo-owners a right to treat that contract as rescinded, were they so minded.

This ground seems so remarkable in its expression, that one cannot help thinking that when a new case with

* M. M. R. December, 1881; 1551.

similar circumstances arises, the position may again be brought before the Courts. A ship's company usually abandon their vessel when hope in her is over—to save their lives. We may imagine that the intention would always be present with the master and crew to retake possession, if ever the chance and opportunity should occur.

Method of Abandoning.

It seems remarkable that there should be no stated and invariable form for performing an act so important in some cases as is abandonment. It is the spirit of the act rather than the letter that in this case is to be considered. It is true, notice of abandonment is usually given in writing, and in much the same words; but it may also be communicated by parol, and will be binding, all other things being valid. The assured writes a circular letter to his underwriters, giving them notice that he abandons the interest insured, to them; and he frequently gives them what information he possesses as to the cause and occasion of the abandonment. If he have acquired his own knowledge of the loss from Lloyd's List or the daily journals, he will refer his underwriters to those sources of intelligence. The more distinct and direct the manner of giving notice, the better; but sometimes an indirect communication, if it be proved afterwards that the underwriters understood it and acted on it, will be sufficient. If the underwriter accepts, he cannot afterwards revoke, except his abandonment was extorted by false information.

It is not generally by implication that the property can be transferred to and vested in the underwriter. Some acts performed by him do indeed imply his recog-

nition of the notice made, and therefore in a court of law, where a loss has been paid, no further proof of the abandonment need be given than the statement of the fact that it was duly made, and that the underwriter *paid thereafter as for a total loss*. The paying the total loss seems either conclusive that all proper formal steps were taken previously by the assured, or else it acts as a waiver, and is a proof that the underwriter has dispensed with some technical formalities.

But if, instead of paying for a loss, the underwriter disputes the claim, then the ownership of the property in discussion is not fastened on him by previous information given, if the giving of it is such as not to be construed as an abandonment. Thus, very full particulars of an accident to the ship or goods may be handed to the underwriter; he may be informed (as in *Thelusson v. Fletcher* *) that the vessel was on shore, and that goods insured by him were damaged, and yet this is not constructively a notice of the assurer's abandonment; and in the case alluded to † that was not admitted, nor the acceptance proved, by the underwriters desiring the assured to do the best he could for the damaged property. Even farther, in another case cited by Mr. Arnould, Lord Ellenborough held it was not sufficient notice that a broker communicated to the underwriters that the voyage had been broken up by the capture of the ship and cargo, and requested them to settle as for a total loss and give directions for the disposal of the property insured.

This last case appears, indeed, to be too strong in circumstance to be relied on in future as a precedent;

* 1 Dougl. 315.

† *Parmeter v. Todhunter*, 1 Camp. 541

and probably the learned judge framed his conclusion, which is put on the score of imperfect notice of abandonment, on other considerations, including the want of right that the assured might have had, from the then position of the property, to abandon at all.

A notice of abandonment requires to be direct and explicit, although limited to no particular form of words. It should give the ground for the abandonment, and refer to the source of information whence the knowledge of the accident was gained by the insured, whether by a protest, a letter received from the captain, a notice in a newspaper, or a paragraph in Lloyd's List. This is to give the underwriter the means of determining whether he will or will not accept the abandonment. It should be signed by the assured or by his agent or broker. Such a notice as the following would be sufficient.—
“The *Mary* having been driven on shore on the Spanish Main on the 10th of June last, and being likely to become a total wreck, as per the accompanying letter from the captain, the assured hereby abandons all his interest insured by this policy to the underwriters. Signed, For the Assured, John Smith. London, 1st Aug., 18—.” The assured will also produce to the underwriters the information he possesses; but he is not obliged to wait till his knowledge of a fact is absolutely certain. Even hearsay, if it has a show of probability, will give him the right to serve notice of abandonment on the underwriters; and in case of ships not heard of, his only knowledge can be but negative; a surmise that the vessel has been lost because she has not arrived, and strengthened by such facts as that other vessels departing from the same port after his own ship's

appointed time of sailing, have already arrived ; or that a violent storm was known to have occurred in some locality where the missing vessel was likely to be at the time ; or that the enemy's ships had been seen in such a direction as made it probable they had fallen in with her, such partial information and probabilities will give the right to abandon.

It is of more importance that the notice should be given to the underwriters in proper time ; because it is only just that if I quit myself of my property and leave it on their hands to dispose of as they think proper, it should be done while and when there is yet an opportunity of their acting on my abandonment, and of taking measures to secure and dispose of the property which has in this manner become their own.

Thus the assured may overstay his time in making an abandonment ; and Park cites a case where a delay of five days was fatal to the assured. He did not give notice till five days after the course of post by which the intelligence of the ship's disaster must have come, and this was held to be too late. This indeed appears an unusually severe decision, as a delay of five days is not a long time, and it might have required some hours for the assured to come to a determination as to the course he would take. But it shows that the assured must not act capriciously, or keep the underwriter in a state of uncertainty by his decision, or elect in his own mind that he will abandon at some future period and so saddle the underwriters with responsibilities not necessarily incidental at the time of the so-called loss.

On the other hand, the underwriter has his reciprocal duty to perform ; and it is incumbent on him to accept

or reject abandonment within a reasonable time. This was laid down in *Hudson v. Harrison*.^{*} It should always be remembered, however, that an underwriter's refusal to accept an abandonment which is made on good and sufficient grounds will by no means exonerate him from responsibility; and if the cause be valid, the assured proceeds with his action notwithstanding the rejection of his notice with an equal chance of success. When once a notice of abandonment has been accepted by an underwriter it is irrevocable as against him, and he is to stand thereafter in the place of the assured; and if any unexpected event should happen to improve very much the prospects of the wrecked property, the underwriter is to have all the advantage of such improvement. Where an abandonment was made and accepted in respect of a ship captured by the enemy, but which was afterwards restored to liberty, having taken prizes, it was held that the property having been legally transferred the underwriters had the benefit of the ship itself, and shared in the distribution that was also made of the prizes taken.

In case of Double Insurance.

If from any circumstance the same interest has been twice insured, the assured may choose on which policy he will give notice of abandonment and claim his loss. Having selected one set of underwriters, he claims the amount from them, and leaves them to secure the contribution of other underwriters themselves.

The introduction in voyage-policies of the words "and thirty days," *i.e.*, after arrival at the ship's *terminus ad*

^{*} 3 B. & B. 97.

quem, which are not unfrequently inserted, has sometimes raised the question of the incidence of loss as in a double insurance, by the overlapping of the limits of two independent insurances. The policy on the outward voyage being, in such cases, "to the port A, and thirty days after arrival," and the homeward policy being contracted as the interest "at and from A, &c." For those thirty (or any other number of) days, the interest seems at first sight to be doubly insured; but the real question is at what moment did the risk on the first policy determine, and the second, or homeward, policy *bite*, and the risk have its inception.

In *Lidgett v. Secreten*,* the outward insurance was "to Calcutta and thirty days." Another policy was on the homeward risk, "at and from Calcutta to London." The vessel was taken into dry-dock at Calcutta, and was in process of being repaired at the time that the thirty days expired. After the expiry of the first policy, the ship was burnt. It was held that the first policy was liable in the diminished value of the ship, *i. e.*, for the damages received during the currency of that insurance; and the second policy had to pay a total loss—undiminished by the recovery of repairs on the first insurance; but having for a benefit all the value remaining in the burnt ship.

Most policies contain the provision in insuring for a voyage, "and until the ship be moored twenty-four hours in good safety." In *Whitwell v. Harrison*,† the vessel was bound to Wallasey Pool. She could not actually enter that place, owing to want of water. She

* L. R. 5 C. P. 190, and 6 C. P. 616.

† 2 Exch. 127.

anchored in the Mersey, near the place specified, and began discharging her cargo ; and after some days, fell over and was lost. Underwriters were held not to be liable, the twenty-four hours having elapsed previous to the loss. Here there was no double insurance, but the case gives the correct reading of "arrival," and "twenty-four hours."

In *Gambles v. Ocean Marine Insurance Co. of Bombay*,* the ship was insured "to Newcastle and for fifteen days whilst there after arrival." She arrived, discharged her cargo destined for that port ; after which she took in some ballast to enable her to move to another part of the port in order to take in cargo for a new voyage ; and she was lost. All these events happened within the fifteen days covered by the policy. The Court of Exchequer decided in favour of the underwriters ; but on appeal, this judgment was reversed, and it was held that on the words "and for fifteen days whilst there," the voyage policy merged into a time policy for fifteen days, and underwriters were liable for the loss.

It may, without presumption, appear to some that the owners in ballasting the vessel to cross the harbour to the place where she was to take in a fresh cargo for a new voyage, and bringing her thither, did virtually relieve underwriters from further risk, and, indeed, indicate that the risks of the insured voyage had terminated. But under the judgment of so great an authority as the late Lord Justice Mellish, we have the law laid down, and not since reversed.

The fact is that the two portions of the underwriters' engagement, though contained in one written instrument,

* L. R. 1 Ex. D. 141 ; 1 Q. B. D. 507.

were consecutive insurances. The ship's arrival put an end to the first risk and caused the inception of the second. This view is confirmed by the necessity, under the Policy Duty Act, of separate duties being paid on this class of insurances, one for the voyage, and the other for the days added.

BARRATRY.

The word Barratry, or, as in the policy, Barretry, now obsolete, formerly signified "robbery." An English writer of the seventeenth century uses the term "common barrators" for common thieves or depredators. Bailey, in his Dictionary, Edit. 1749, says, "Baratry is when a master of a ship cheats the owners or insurers, either by embezzling their goods, or running away with the ship.—*Law term.*" In seeking the derivation of the word, we fly naturally to the Italian and Spanish languages; and we find in the former *Barattare*, to cheat, and *Baratto* and *Barattatore*, a cheat. In Spanish, the word and its derivatives are more copious. We have *Baratar*, to cheat or deceive; *Barata*, a fraudulent barter; *Baratador*, a barrator; *Baratero*, to cheat, or take by force, at cards or other gaming; and we have the noun itself, *Barateria*, meaning barratry, fraud or deception.* We also meet with the verb *Barar*, to strike the ground or strand; and we are inclined to ask whether we do not find in it the root of the other words, as a fraudulent stranding of a ship would be an early

* This word will recall to most minds pleasant memories of Cervantes' creation, when Sancho Panza became Governor of the island of *Barateria*, where all was illusion to himself by means of the deceptions practised on him by others.

method of defrauding the shipowner and merchants. The French have as a term in maritime law, *Baraterie*, meaning barratry.* Among ourselves, the word, as far as I know, has a current existence only in the policy of marine insurance, and in some bills of lading. Its meaning as understood, till lately, was an act of wrong done by the master or by the crew, or by both, when in charge of a ship, without the concurrence of the owner, by which loss or damage is entailed to any of the interests, and to the underwriters, who by their policy undertake the risk of barratry. The tendency of the present day appears to be to enlarge the comprehensiveness of the term, and to make it include all unbeneficial acts and conduct of a shipmaster and seamen, save their absolute incapacity for their duties when they first go on board the vessel at the beginning of a voyage.

Turning to English law, it cannot be complained that we are left without guides in the way of definitions of Barratry. Indeed, the difficulty is rather that of steering among so many beacons; and we occasionally find ourselves "dark with excess of light." Taking these definitions in somewhat chronological order, we find Lord Hardwicke describing Barratry as "an act of wrong done by the master against the ship and goods (*Lewen v. Suasso*); † thus clearly making fraud a necessary ingredient in it. Then it was solemnly decided by Lord

* The original meaning of the French term is somewhat different. It is stated to be derived from the old word *barratter*, to wrangle, to stir up quarrels:—a *barretor* is a brawling maintainer. An old English dictionary also gives the meaning of *barretry* "in policies of insurance for ships," as dissensions and quarrels among officers and seamen.

† Postlethwaite's Dict. 177, tit. Assurance.

Ellenborough that “a gross malversation by the captain in his office is barratrous.” The same judge, in *Todd v. Ritchie*,* proposed a more occult test. He said, “Barratry is a crime; and the captain must be proved to have acted against his better judgment.” It would be difficult to show, in many cases, the degree of prudence and right-mindedness which would be entitled to the name of a shipmaster’s “better judgment,” and whether he acted against it—this being a matter of “boundless better, boundless worse”; and whether his act was not rather against law and honesty than against judgment. Mr. Parsons (Maritime Law) describes as barratry, “Any wrongful act of master, officers, or crew done against the owner.” And it has been declared to be barratrous to use a vessel for the purpose of smuggling, or any illegal acts, because that is risking the property of another without his permission. The Merchant Shipping Act eliminates the notion of fraud from nautical malfeasance, and enacts that “any damage by non-observance of rules shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, &c.” And in the case of *Grill v. General Screw Collier Company* † to be mentioned hereafter, the ground of the defence was that an act of carelessness, read in this light, was an act of Barratry; and Barratry was one of the perils excepted in the company’s Bill of Lading.

Though the scope of the word has become very wide, and now would seem to embrace every voluntary act of the persons in charge of a ship at sea in producing any loss or misfortune, we must recall that the term in its common acceptation means the wilful misdemeanor of

* 1 Stark. 240.

† L. R. 1 C. P. 600.

the commander or crew of a ship, or of both combined, whereby the vessel or her lading are injured, lost, or made to incur extraordinary expenses. Considering how great are the opportunities, and, it may be added, frequent the temptations to wrongful dealing acting on the masters and seamen of merchant ships, this species of loss may be said to be singularly uncommon; especially when we reflect that they are often in foreign ports, among strangers, or are distant from observation and freed from most kinds of restraint—isolated in the solitary paths of the ocean. All losses and damage coming under this head are claimable from the underwriters. Though the insurers have no part in the appointment of a master, by which the responsibility they take upon them is so greatly affected, they are liable for his acts and conduct; and nothing will exonerate them from their consequences except the absolute incompetency or unfitness of the master, his officers and crew, and, in some cases, the pilot, which, if it can be proved, renders the ship unseaworthy at the commencement of the voyage and causes the policy to be void from the first. It is sufficient, however, for the assured to show that the master and ship's company were fit and sufficient at the time of commencing the voyage, for the implied warranty of seaworthiness does not extend to a guarantee that the seaworthiness shall continue.

Collusion with Owner.

It is necessary that the captain should have no understanding or collusion with his owners in his barratrous acts. If an owner's concurrence can be shown, the act ceases to be barratrous. It may be a conspiracy between

the master and owner; but underwriters are liberated from any loss which comes under the head of Barratry mentioned in the policy if there be knowledge and complicity on the part of the owners. And therefore if the master be a part owner himself, there can be no Barratry. It is necessary, however, to state that the assertion of the principle just made requires some limitation, owing to a decision in the Exchequer Chamber, in the case of *Jones v. Nicholson*,* which laid down that, if the master, being a part owner, fraudulently sell the ship and goods without the consent of the other part owners of the ship and proprietors of the goods, he is as much guilty of Barratry as if he were no owner at all. Perhaps this single case is scarcely conclusive of the matter, which is of great importance. At any rate the general rule respecting collusion of owners remains untouched: and Barratry is impossible by a master who is sole owner of a ship.

Wilful Destruction of the Ship, &c.

The most glaring cases of Barratry are those when the destruction of the ship is compassed by the master and crew; as by boring holes in her and so causing the vessel to founder; the setting her on fire; or their carrying her away and selling or otherwise getting rid of her so as to possess themselves of the proceeds of the ship and cargo.

* 10 Exch. 28.

Smuggling.

Less obvious misdemeanor will also come under the name of Barratry. The master may engage in smuggling contraband articles, and the vessel and cargo may thus become forfeited to the Queen. Any permission given by the owners to smuggle being proved takes the case out of the title of Barratry.

Two important cases should here be mentioned in reference to an underwriter's liability. The first was a private one and did not go into Court. A ship in a port in Spain, from some private intelligence given to the Customs there, was found to have a small quantity of tobacco in the forecastle. It had been secreted behind the skirting-boards by one of the seamen; and had travelled about with the steamer at least on three voyages, no opportunity having been available to the seaman for landing or disposing of it. The ship was threatened with confiscation, but this consequence was escaped by the payment of some money. It was shown that the master had no knowledge of the tobacco being on board; indeed, he had joined subsequently to its having been placed in the vessel. On explanations given, the underwriters paid the sum expended to extricate the steamer from seizure; and it was clear that neither owners nor master had any guilty knowledge of the seaman's action.

The other case was litigated. In *Cory v. Burr*,* the policy contained the ordinary clause of Barratry of the master and crew, and excepted, by a written clause,

* Appeal, 1st July, 1882, *Times*, 3rd July, 1882.

underwriters' liability for "capture." The ship having been engaged in smuggling was seized by the foreign government, and was ransomed from confiscation by a fine paid. The plaintiffs claimed on their policy in virtue of the barratry clause, urging that the malfeasance of smuggling leading to the loss or amercement was the true and efficient cause thereof. The defendants pleaded that the actual cause of loss was the capture or seizure; and the Court, acting on the old maxim of *causa proxima*, decided in the underwriters' favour. The arguments which may be held on each side of the question are weighty and pretty evenly balanced. On the assured's side it may be urged that a somewhat discredited and almost obsolete maxim should not carry the day against fact and right reason. The true cause of the seizure was the vessel being engaged in smuggling. The seizure was only the form of the loss. Were several other admitted claims tested by the logical *causa proxima*, they too might have been resisted.

Deviation.

A ship being insured on a voyage stated to be from A to B, without licence to go elsewhere, is not to deviate from her course and put into C, except under a necessity. This is a case requiring great discrimination to decide at what point the master's conduct becomes barratrous. It is not enough to say that the captain deviated from the voyage, and therefore the underwriters become liable through his Barratry. There are deviations which have not this character. The master may deviate in his sheer ignorance that he is restricted from doing so. He may be

impelled by the idea of making a great deal of profit for his owner by going to some port or place for which he has no licence given. The tendency, however, of the latest cases is to disregard motive, and to construe any misconduct of the master, even when intended to benefit his owners, so long as it is unauthorised by them, as barratrous. So there may be a justifiable deviation in time of war.*

A master of a ship must not deviate from his voyage in order to gain profit by towing or assisting other vessels that may be glad of aid. Nevertheless the laws of humanity override all other regulations, and a master is quite justified in deviating where there is a great necessity, as in order to pick up the crew of a wrecked or burning vessel, or in lending aid to one in great danger of foundering, &c. Should the deviating ship itself sustain damage or loss, the underwriters would remain liable: the conduct of the master and crew would not in such a case be barratrous. Such a deviation is justifiable, or rather, it is praiseworthy under the circumstances.

A deviation does become barratrous when the owner can show that it has been made by the captain against his, the owner's, wishes and directions. If the owner can purge himself from all expectation of profit by the deviation, and show that he had done everything in his power to prevent any such deviation, the conduct of the captain will be seen to be more than erroneous: in fact to be so wilful and disobedient as to amount to Barratry.

Underwriters are not liable for consequences of a deviation in rendering assistance to a vessel in distress,

* *The Teutonia, Duncan v. Koster*, L. R. 4 P. C. 171.

if profit or the expectation of profit mixes up with the purer motive of humanity. So in a late case a steamer towed a ship in distress, and in doing so, got, herself, on a sand and became a wreck. It was shown that, however justifiable was the deviation as to saving the crew of the ship in danger, there was, besides, an agreement or understanding between the two masters that the aiding steamer should receive compensation for the saving of the cargo in danger; and this second motive was fatal to a claim on underwriters. See the case of *Scaramanga v. Stamp*,* in which the two elements of saving life and saving property were mixed up. The word expediency also was introduced. The Court stated that the case was one of "first impression," which we interpret that the circumstances came for the first time before the Court, and required law-making.

The general subject of deviation belongs to Insurance and not to Average, and therefore it need not be farther entered upon here. Perhaps there is no head of insurance law which has given rise to finer distinctions than deviation, or which involves *intention* so greatly in the discussion of actions.

Misconduct of Master and Crew.

It has been already seen how intimately connected this subject is with Barratry. There can be no question that a great number of ships and a vast amount of merchandise are lost owing to the faults, intemperance and bad conduct of the master and crew. It is difficult to procure evidence in these cases. Sometimes the errors

* 4 C. P. D. 316; S. C. on appeal, 5 C. P. D. 295.

and misconduct are fatal : all hands perish, and no one remains to tell the tale. Sometimes all on board have participated in the same misconduct, and no one will make disclosures in which himself is implicated. In other cases the authority of the master is resisted by the men, and if the resistance be general, the captain being powerless to punish, or to secure obedience, cannot help things taking their course. He may not be able to make the crew go aloft in violent weather to take in sail, or to keep them to the pumps, or to preserve a proper look-out. In notarial protests complaints of such resistance to authority are not often found ; the log-book more frequently shows traces of an uncomfortable intercourse between the sailors : and on the whole it must be inferred that there is a great deal of concealment when any accident has happened in consequence of quarrelling and other misconduct. Certain it is that hitherto the occasions are comparatively few in which the plea of Barratry has been used as the basis of a claim for loss against underwriters.

Wilson v. Rankin.

Two important cases claim to be mentioned as bearing both directly and by implication on the subject of Barratry and the misconduct of master and mariners. The first of these, *Wilson v. Rankin*,* was an action on a policy on freight from Restigouch to Liverpool. The vessel was chartered to proceed to Restigouch, in British North America, to load a cargo of wood goods “and deck-load, if in season.” She was lost on the voyage to

* L. R. 1 Q. B. 162.

England. Under the Merchant Shipping Act of 1853, which was invoked by the defendants in their defence, deck-loads were rendered illegal from ports in British North America between the first of September and the first of May. And it was obligatory that the captain of a vessel, when loaded, should obtain from the shipping master a certificate that the whole cargo was stowed under deck during that specified season. No master was allowed to sail till he had obtained such certificate. Spare spars were not to be deemed part of cargo. Section 172 imposed a penalty for breach of enactments.* The vessel sailed in November, and therefore within the time of restriction. The captain loaded a small quantity of deals (about 30) on deck and some spars. This deck-load was not shipped by the charterer, and the deals were taken without the plaintiff's, the owner's, knowledge. They were intended for the use of the ship, but not for that particular voyage. It was shown to be a common practice for vessels going to that port to take some spars on ship's account because they are obtained there much cheaper than in England.

A loss having happened after sailing from Restigouch, and a claim having been made on a freight policy, the underwriters resisted payment, and pleaded: 1. That the vessel was not lost by perils insured against. 2. That the ship was not seaworthy when she sailed. 3. That they were free as to the loss of the deals on deck, by the Act already quoted. 4. That they were not liable as to the whole cargo by the breach of the Act having made the voyage illegal, both in the ship carrying a deck-load,

* All restrictions to carry deck-loads were removed by the Amended Act of 1866.

and in sailing without a certificate. 5. That the plaintiff had knowledge of the deck-load, or the intention to take one. At the trial before Justice Shee in Liverpool, the underwriters were successful on the third and fourth pleas, but the plaintiff had a general verdict, and the defendants were allowed to move to set it aside. As it was established that there was a breach of the statute, the question was narrowed at the subsequent trial to the point with which we are at present engaged, and which gives this cause its interest; namely, the character of the captain and his acts, how far they involve the shipowner, as participating in them, to his disadvantage with his underwriters, or are to be considered external to him and in that sense barratrous. It was argued on the part of the underwriters that the breach of the Act had rendered the voyage illegal and the policy invalid; and that the master was the agent of the owner so as to bind the latter to his acts. The judgment which was in favour of the plaintiff, the assured, was delivered by the Lord Chief Justice; and proceeded on the ground that the owner could not be taken to have constructive, as he had not actual, knowledge of the illegal act of his master; for knowledge by the assured was necessary to avoid the policy: also that the implied authority under which the captain acted must be taken to be limited to that which is lawful: so that if a master does an act in contravention of the laws of his country he is at the same time guilty of a breach of the implied orders of his owners, even though he acts, as he supposes, for their pecuniary advantage.

In this sense, therefore, an error of judgment in a shipmaster producing ill consequences may be converted

into an illegal and, consequently, barratrous act; the effects of which are entailed on the underwriter, and not on the owner under whose general authority the master acts.

*Grill v. General Iron Screw Collier Company.**

The second case to be mentioned is that having the title above. It was tried in the Court of Common Pleas, in June 1866. The action was on a Bill of Lading, which contained, among other excepted risks or contingencies disclaimed by the shipowners, that of Barratry. The steamer, the subject of the action, the *Black Prince*, came in collision with another steamer, the *Araxes*, and sank; and it was proved at the trial that the accident took place in consequence of the negligence of the persons on board the *Black Prince* in starboarding her helm. The plaintiff having received loss and damage to goods on board the steamer, brought his action against the owners as carriers; they having made a breach of their contract in the Bill of Lading "through gross negligence." The defendants pleaded the exception in their favour of Barratry in their Bill of Lading, and depended on that section of the Merchant Shipping Act of 1854, which enacts that "any damage caused by non-observance of rules shall be deemed to have been occasioned by the wilful default of the person in charge of the deck, &c.:" and they built on this language the plea that, therefore, the negligence complained of was barratrous; and if barratrous, was within the exceptions specified in their contract as carriers.

The whole subject was amply discussed, and the

* L. R. 1 C. P. 601; 3 C. P. 476.

various definitions of Barratry were produced. The judgment was against the Steam Company. The Court held that the conduct of the men in charge was not shown to be barratrous, though negligent: that the epithet "gross" did not add a new feature to negligence; that there might be errors committed; that men might sleep who should have been watching; that there might be negligence, "gross negligence"—if the term is preferred—and yet there need not be Barratry. And in reference to the analogy pressed on the Court of the policy of marine insurance, Justice Willes drew the following important distinction:—"I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea; and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea. The fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent it coming within the contract. The Bill of Lading is different: it is a contract to carry with reasonable care, unless prevented by the excepted perils."

There are now associations called Protecting and Indemnity Clubs, in which a shipowner can insure himself against the consequences of bad navigation and negligence of his master and crew.

The French Law respecting Barratry.

If we refer to the law of France, we shall find Barratry treated in a more systematic manner, and the whole conduct and liability of the captain put under regulations more exact than our own, and in some points differing from them.

In the first place, Barratry of the master is distinguished into criminal and civil. The former falls under the legislation of April, 1825; the latter is ruled by the *Code de Commerce*. Civil Barratry includes frauds (*dols*), faults, imprudence, or unskilfulness (*imprudences ou impérités*) by which prejudice is occasioned to ship or cargo. Under the expression of Barratry of the master is included all the faults, &c., of the ship's company.

Barratry does not in France affect the underwriters, unless by special contract they undertake that risk. More strict in their view of agency than we are, the French ground their rule on a dictum of the Digest, that all acts of a shipmaster are to be attributed to the persons who constituted him such. Barratry must be proved. It is only assumed in the one case of fire. When underwriters undertake this risk—as with ourselves—there is no Barratry if the master have proprietorship in the interest insured. And it does not affect the underwriters when the faults, &c., of the captain are committed in the character of supercargo. The underwriters taking risk of Barratry have their remedy against the master. Damage by rats comes under the head of Barratry of the master, even when rats eat gall-nuts, of which—by a strange taste—they are excessively fond. An underwriter on ship insuring against Barratry is liable for damage occasioned to the cargo.

OF THE SHIPMASTER'S DUTIES AND POSITION.*

His Responsibility.

Having had occasion to refer to the part which the master or commander of a merchant vessel plays, a fitting opportunity arises for enlarging somewhat on the duties and the position belonging to him.

There is scarcely a member of society from whom more is expected and demanded than from the Shipmaster. One cannot name a class connected with commerce that is trusted so largely and so entirely as the masters of merchant vessels are; and it would be difficult to point out any person more liable to be placed in situations of difficulty and of danger,—situations requiring caution, self-dependence and integrity, than the captain of a trading ship. Not only is the whole property of the vessel, her cargo and her earnings within his power, and its safety dependent upon his honesty, his prudence and energy, but the very lives of the crew and the passengers hang, as it were, on the master's experience, watchfulness and sagacity.

Should we wish to place in a strong light the confidence which is reposed in the commander of a merchantman, we may do so by supposing that the proprietor of a large warehouse gave the entire charge of it to a person with whom he had had but slight previous acquaintance, and whose origin might have been with the humbler ranks of society; that the proprietor intrusted this

* See also my small volume on this subject, *THE PORT OF REFUGE*.

person with the building itself and the whole of its valuable contents, consisting of bullion and goods belonging to himself, and others to whom he was responsible for their value ; that he gave him the keys of the warehouse and then himself removed from the neighbourhood, leaving this person in possession of it ; that he gave him for assistants a number of men collected promiscuously, concerning whose habits and honesty both of them were ignorant, but over whom this person was to exert authority and command obedience ; that he was to secure their good conduct only by the position he held and by the force of his own character. This picture may produce some idea of the responsibility of the master of a vessel laden with a valuable cargo. But it falls short of the truth. For the warehouse we have supposed is built on shore, and is, of course, immovable ; it can be visited whenever the proprietor chooses : but the ship is consigned to the most fickle elements, and is in constant motion and change of place. Each one of those elements may be its enemy. Tempestuous winds and seas, hidden rocks and sands, fire and lightning, are by turns ready to destroy the valuable prize floating upon the ocean ; and it requires all the master's foresight and perseverance to avoid or to escape from the dangers which everywhere and at every hour threaten that which is in his trust. Again, in a very great measure the whole success of the voyage and the undertaking generally as to the production of freight depends upon his judgment and decision.

So great a responsibility and so implicit a confidence impart to the office of the shipmaster a certain dignity which always attaches to the person who leads his fellow-

men, and on whose conduct the safety and fortunes of others depend.*

Again, certain attainments are absolutely necessary to every master of a vessel larger than a collier or a fishing lugger. He must have a competent knowledge of navigation, involving as that does to some degree the sciences of astronomy, mathematics, and hydrostatics. He must be an accountant, to prevent the transactions of the ship getting into inextricable confusion, and to enable him in some trading voyages, where no other supercargo is employed, to undertake the whole commercial department himself. He must know the leading features of mercantile affairs, and even a little law, in order to avoid falling into difficulties and involving others also in them;† and he is sure to have to do with charters, bills of exchange, bottomry bonds, &c.

A shipmaster is also expected to know the construction of his vessel; and that sufficiently perfectly to be

* In the cause of the loss of the *John*, 3 W. Rob. 170, in July, 1855, Justice Williams said, "By the law of this country, if a man took upon himself an office such as that of commander of a merchant vessel, for which a certain quantity of skill, care and activity was requisite, he was bound to be ordinarily skilful, careful and active in the discharge of his duty; and if by his unskilfulness, carelessness, negligence or supineness he caused the death of a fellow-creature, he would be guilty of manslaughter."

† Without knowledge of mercantile law and the special enactments for the protection of the revenue, &c., a master may involve himself in serious difficulties. The technicalities are sometimes very minute, and require considerable powers of memory to avoid falling into a premunire. As an example: By the legal Customs' regulations a master may not break bulk nor land any part of his cargo if he be within four leagues of any port or place in the United Kingdom, before an entry has been made and a warrant has been granted, under a penalty of £100; *but he may land diamonds and fresh lobsters without entry and warrant.*

able to watch and superintend repairs, whether to the hull, the mastage, or the rigging. The technical knowledge of many masters is really great, and would lead one to suppose that they must have studied ship-building, theoretically and practically. They do indeed study it, and that in the most efficacious manner, by having the subject-matter of their study ever near them by night and day, and by feeling the importance of every beam and bolt, every rope and block throughout the vessel. In case of accidents and emergency they become fertile in expedients to replace or substitute what has been lost or damaged. How few people living on shore have any knowledge of the construction of the house in which they live, and have lived, perhaps, for years. How very few could understand properly the tenth part of the technical terms of builders, or even the names of their tools. Fewer still would have sufficient self-confidence to decide on repairs to be done, or fix the means of setting about the repairs. Yet we must remember that all this is known and done by the masters of vessels, and they sometimes display great ingenuity in their temporary repairs—in rigging jury masts, making and hanging an *ex tempore* rudder, &c. When this is required at sea, even if there be a carpenter on board, it is the captain who must order and superintend the work. In fact, seafaring men become apt and handy; they are often in situations where it is necessary at least to make an effort to accomplish their objects, and they learn practically that most objects are attainable to earnest endeavour.

And, lastly, he must be a disciplinarian, both over his own temper and appetite, and over the men who are under his command. It is known perfectly well that a

considerable proportion of losses and accidents to ships arises from intemperance. If the master be intemperate or weak he immediately loses his authority over the ship's company, and then the worst consequences ensue. His influence must be a personal one whilst at sea. There is no marine police there to enforce his commands or punish a refractory crew. Self-preservation certainly will come to aid him in getting the people to obey him in ordinary circumstances; but it requires some force of character to make men endanger their personal safety, as, for instance, in going aloft to take in sail whilst the vessel is rocking and the masts bending in a storm at night.

The self-dependence which is required for situations of danger at sea must be his companion in difficult positions on shore. A great responsibility, as we have said, rests upon him. So much depends on his judgment and determination; and a wrong step is easily taken. It is true that due allowance will be made for his acts if it can be seen that his intention was to do for the best: his *bona fides* will excuse some errors in judgment. Yet not always. A judge or a jury will sometimes fix on him the responsibility, not only of acting honestly, but of acting wisely; not only of doing what was best in his opinion, but what was really the best under the circumstances. In *Tronson v. Dent*,* where a ship, from injuries received at sea, was obliged to put into Singapore, and the cargo was found partially damaged by sea-water, and the master, who acted *bonâ fide* and to the best of his judgment, selected some damaged chests of opium and sold them by auction, the owners of the ship were found

* 8 Moo. P. C. C. 419, 449.

liable to the consignees of the cargo for the loss arising out of that sale; because it appeared that the captain might have had the damaged opium dried and repacked whilst the vessel was being repaired, and have delivered it, though in a damaged condition, at its destination. It was held that it was the duty of the master to have carried the goods to their place of destination, although in a damaged state.

This decision seems severe; for we should have considered that a shipmaster and his owners would be held harmless for the acts of the former proceeding under the advice of surveyors, and taking a course which was a very usual one under such circumstances, although a better course might have been possible. It was an error of judgment, and it is important to see that such errors often entail grave responsibilities.

Again, in the case of *Avery v. Bowden*,* an over-caution of the master, even, defeated its object, while a more rapid decision would have secured it. An agent at Odessa having told the master of a ship that he had no cargo for him, the latter, instead of sailing away at once under this breach of the charter-party, still remained at Odessa after war had been declared, and repeated his application to the agent for a cargo. It was held that the captain by remaining after the declaration of war and insisting on having a cargo, waived the breach of the charter-party. So, again in *Sieveling v. Maas*,† the question hinged upon a very nice point as to the captain's duty in waiting for orders. By the charter-party he was to wait at Elsinore, on his way from the Baltic, for

* 5 E. & B. 714; 6 E. & B. 953.

† 6 E. & B. 670.

orders. He called there, but finding no orders for him, he sailed to Leith, where he discharged the cargo. The merchants endeavoured to throw the responsibility on the master of having delivered the cargo at Leith, affirming that he should have communicated with him, residing in London, by electric telegraph. The judges were agreed, however, that that was not his duty, and the verdict was in the captain's favour.

Wherever it is possible, the master when in difficulties is bound to communicate with his owners before taking any step of importance. In *Anderson v. Geldart*,* the captain omitted to do this, and sold the cargo of coals at Lisbon, they having become wet from the vessel springing a leak. The owners had to return the freight paid in advance, and to make good the loss on the sale.

Thus then we see again that a fault of judgment or deficiency of knowledge in a delicate question has serious consequences.

The judgment of the master has to be exerted for all the interests associated under his charge. As soon as he sails on his intended voyage, he becomes, not only the guardian of the several interests, but in some respects the agent for all parties concerned in ship, cargo, and freight. He stands especially in this position in a foreign port where he may have been compelled to put in by perils of the sea. He may there employ an agent, Lloyd's agent if there be one; and if he take the best advice and assistance he can procure he will generally be exonerated from consequences, in the same way as a trustee is exonerated who acts under the advice

* Exchequer, July, 1854.

of his solicitor. But the shipmaster is a trustee; and he ought not to permit himself to be persuaded or forced to relinquish that trust. Lord Denman delivered that the captain was agent both for ship and cargo. This being so, nothing less than a special power sent to an agent at that port of refuge by one or all the interests can take away the master's power to act in behalf of those interests. There is probably no part of a shipmaster's position less understood by him than the relationship existing between agents and himself. Possibly, too, some agents are under a misapprehension about their powers and position; and Lloyd's agents, being clothed with a semi-official character, are most likely to imbibe wrong ideas respecting it themselves, and to convey wrong impressions of it to others.

The British Consul has indeed an actual power in cases of emergency; for he can displace the master for misconduct, and appoint another.

The captain being, then, the agent of the ship, primarily, and also of the cargo, can, like other agents, bind his principals by his acts; but then they must be honest and proper acts, and they must not exceed particular limits. Thus, he can give a bottomry bond, and that bond will be binding on his owners, and if it be a respondentia bond it will bind the cargo also: but then the subject-matter necessitating the bond must be supplies for the actual needs of the ship; and if extravagant expenditure or private advances be included in it, the bad portions of the bond can be set aside by the Court of Chancery or the Court of Admiralty.

It was held in a case in the Court of Exchequer that the master of a coasting vessel could, by contract made

in England, bind his owners, who likewise resided in England, for a loan of money for the necessary use of the ship. (*Arthur v. Barton*.*)

But the master must use discretion and, if possible, communicate with his owner before proceeding to execute a bond, otherwise it will not be valid. See the case of *Wilkinson v. Wilson*,† in the Admiralty Court.

And the authority of the master stops short in some directions. So he has no implied authority to make the owner liable for the expenses of seamen injured by an accident and put on shore, incurred for their maintenance and care ; as by the case of *Organ v. Brodie*.‡

There are some acts which are permissive to, but not incumbent on, the captain to perform. Thus when his ship is disabled and in a port of distress, and she cannot carry the cargo to its destination, the master *may*, but he is not bound to do it, forward the cargo to its intended receivers by other means which he may be able to secure. Should he, however, omit to do this he has not failed in his duty. If he can effect the right delivery of the cargo at the intended port of discharge at a lower rate of freight than that stipulated in the original bill of lading, the

* 6 M. & W. 138.

† 8 Moo. P. C. C. 459.

‡ 10 Exch. 449. Nor can he bind his owners to pay additional sums to seamen under articles, so as to vary their stipulated wages, except when from circumstances those articles cease to bind the crew ; as when from the unseaworthy condition of the ship danger to the seamen's lives is incurred in proceeding on a voyage ; then, if the master, acting for the best, makes a contract with the seamen, who agree to incur the additional danger for a farther sum of money, the master's contract will be upheld : he is not acting *ultra vires*, but properly, and as the case warrants. (*Hartley v. Ponsonby*, Q. B. June, 1857.)

receivers are bound to pay the original freight, and an advantage is gained to the shipowner.* But should he in the exercise of his discretion think fit to send home the goods in another vessel at a higher rate of freight than was agreed at the first shipment, the receivers of the cargo are bound to accept their goods and to pay the advanced rate of freight. It is required, however, that the master should use a sound discretion, for we have seen, above, that his acts may be repudiated in some cases, if it is clear that a better and more advantageous course was open for him to choose.†

So again, if he be obliged to sell part of the cargo to pay Average expenses in a port of distress he will select those goods which would be most judiciously disposed of; and as a loss of freight is also entailed by the sale of cargo, a careful master will try to reduce the loss by procuring, if possible, fresh goods to fill up the vacancy in his lading.

He is to regard the interests of all the parties associated

* See *Kidstone v. Empire Insurance Company*.

† In *Gibbs and Others v. Grey and Others*, 2 H. & N. 22, where the master of a vessel which had put into a port, and could not carry on her cargo, chartered another ship at a higher rate of freight which was to be paid on a stated quantity; and he did not previously to this proceeding consult with the agents of the cargo, who resided at that port; and it turned out on the second vessel discharging the cargo that she had less by 120 tons than the specified quantity, it was decided that the captain had no power to bind the merchant to pay the dead freight, *i. e.*, the freight for what was not on board; although he was justified in taking steps to forward the cargo in a prudent manner, and therefore no objection was taken to the higher rate of freight at which the cargo which was delivered came home. Yet cases have occurred where in a foreign port no other terms could be made than that the tranship should be paid as on a *full* cargo at an agreed rate of freight.

in the adventure which he is conducting. He is not to sacrifice one person or class to another. Amongst the others he is to protect the underwriters' interests and rights. It is, unfortunately, the case that some masters of vessels have been taught to think that "the underwriters" are an inexhaustible mine of wealth, and that to let them be plundered, and even to help occasionally to plunder, is perfectly fair. False bills for repairs are sometimes connived at; presents are received from tradesmen; concealments of facts are made, and the like. I believe that this gross injustice really proceeds in many cases as much from ignorance as from a low moral sense, and from an utterly false notion as to the nature, habits, wealth, and knowledge of the underwriters. And it is not to be wondered at if those underwriters, finding out occasionally that they have been used and imposed upon, should become imbued at last with a general scepticism about claims, attributing sometimes wrong motives where none such have existed. And thus there springs up an antagonistic and litigious spirit between the assured and the assurers. Each thinks the other prejudiced against himself; whereas it should be felt that the true interests of both are united; that what affects one of them influences the other also; and that a great saving of expense and trouble would sometimes be effected by a freer communication between the underwriters and the persons insured.*

The following miscellaneous particulars of the master's duty and position are extracted and condensed from that

* I allow these sentences to remain; but buoy myself up with the hope that the years that have passed since they were written have brought about a better state of things.

very valuable work, Maude and Pollock's *Compendium of the Law of Merchant Shipping*.*

He is, in the eye of the law, the responsible person, and he can bring an action and can sue for freight under a contract to which he is a party, in his own name. He can also sue the consignee for primage, although the latter have settled the freight with the shipowner. He may not trade on his own account, nor earn money by hiring out his services to another person.† The master's authority over the crew and other persons on board exists, not only whilst his ship is at sea, but also whilst she is in a foreign port or river; and to support his authority and maintain discipline, he may use restraint and violence to the persons of those under his influence.‡ Before sailing it is the master's province to procure a competent crew. He is generally personally liable for all Port, Light, and other dues. He is bound to protect the cargo when on board, both against thieves and the weather, &c. He is even made responsible, and the master and owners are liable, if goods are stolen in port. The master has been held liable for goods stolen out of a

* Fourth Edition, 1881.

† By the 191st section of the Merchant Shipping Act of 1854, "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which, by this act or by any law or custom, any seaman has for the recovery of his wages."

The seamen's remedies are threefold: against the ship; against the owners; and against the master. The master has the two first of these remedies.

Being placed on the same level of advantage as the seamen in recovering wages, like theirs, his wages are no longer insurable.

‡ This must be understood of English Shipping. Some nations give their foreign consuls jurisdiction over the ship and her company while in the port where the consul resides.

lighter fastened to the ship into which they had been discharged in the Thames. He is bound to prosecute the voyage without deviation therefrom: an unnecessary deviation makes him and the owners, liable for loss or damage occurring subsequently. The master is bound to communicate to his owners, as opportunities may occur, intelligence of any events that may affect their interests, and especially of any accidents which may have happened to the ship, &c. The master is not merely an ordinary agent, but to some extent and for some purposes he is the owner of the ship for the time being; and thus his acts not only bind his owner's credit, but personally bind himself. So the owner is bound by contracts entered into by the master relative to the usual employment of the ship. He may bind the owners for necessary repairs and for money borrowed and employed for the making them, both when the ship is abroad and at home, if it be in a place where the owner does not reside and where he has no agent and cannot be readily communicated with: but the outlay must be confined to necessary uses. He may sell* or hypothecate ship or cargo in cases of

* In a case tried in the Admiralty Court, the *Glasgow*, Swa. 145, otherwise the *Ya-Macraw*, August, 1856, Dr. Lushington made the following observations as to the power of the master to sell the ship under his command:—"The general principle sanctioned by maritime law is, that the master, as master, has no authority to sell; that necessity alone will justify such a sale, and render the transfer valid. The question, then, is as to the existence of an adequate necessity. This necessity is to be judged of by all the circumstances of the case. I will name some of them—first, the state and condition of the vessel; secondly, the consequences of not proceeding to sell; thirdly, facility of communication with the owner; fourthly, the resources of the master, or the total absence of all resources; fifthly, in some degree, too, the power of the master to avert a sale. I conceive that the law inclines against sales of this description, and throws the burthen of

necessity; but he cannot pledge the ship *and* the personal credit of the owner; and an instrument which is merely a collateral security for bills drawn on the owners is void. When a captain sold part of a cargo under circumstances which did not justify such a step, although he was acting *bonâ fide*, both he and the owner were liable to the merchant in an action for trover. Whilst the vessel is afloat or is in a foreign port where there is no agent of the cargo, the master is agent at once for all parties in the adventure, and must act with sound discretion. One of the most critical points he is called upon to decide is whether, in the event of the ship receiving such injury during the voyage as to prevent her from completing it, her cargo should or should not be transhipped so that it may reach its port of destination. If the cargo be captured by an enemy or by pirates, the master may ransom it in the latter case; but he is forbidden to do so by statute in the former instance.

I would again refer to a little volume published by me entitled *THE PORT OF REFUGE*,* in which I have endeavoured to give, shortly and clearly, a good deal of instruction and advice to masters and others concerned in shipping.

strict proof upon the purchaser, for it is his duty to ascertain the authority under which the master acts, or the circumstances which render a sale imperatively necessary; and from this proof, save where there has been a decree by a competent Court, no formality will release him."

And lastly, the master will not fail to take a pilot in every place where his own knowledge is not great, and a pilot can be obtained. To do so relieves him of his own responsibility; and the circumstance of the ship being under command of a pilot will, in case of accident, also protect his owners against other parties.

* Bumpus, George Yard, Lombard Street, E.C.

The last two years have been fruitful in oral and written discussions as to the liability of a shipowner for the acts of his master, officers, and crew. Those who have maintained most energetically the owner's freedom from liability argue on the ground that the owner, having selected a master passed and certificated by the Board of Trade, and first and second officers likewise, has done all that is within his power to do for the safety of the ship and voyage. When once at sea his operative power is quite over as to guiding and safe-guarding the vessel and her contents.

In *Davidson v. Burnand*,* where a stop-cock was left open and water filled the steamer and damaged her cargo, the underwriters were held liable for this negligence, as being a "peril of the sea"; and in *Good v. London Steamship Owners' Indemnity Protection Association*,† where two taps were left open by the negligence of the crew, it was held by the Court to be "improper navigation," and so at the insurers' risk, under terms of their policy or deed.

So again, in *The West India and Panama Telegraph Co. v. Home and Colonial Insurance Co.*‡ where an accident had occurred by the bursting of a boiler, the shipowners were held not to be responsible for the neglect or bad navigation of the master and others on board. And the judgment of the Court below was confirmed on appeal.

Nevertheless, negligence on the part of those in charge of a ship may entail serious consequences on owners.

* L. R. 4 C. P. 117.

† L. R. 6 C. P. 563.

‡ 6 Q. B. D. 51, April, 1880.

Thus in *Prehn v. Bailey*,* the vessel by her own fault was sunk by collision, and was raised by the action of the Thames Conservancy, together with her cargo. The merchants signed an undertaking to pay General Average and charges applying to cargo, but the Court absolved them from contributing to the expenses of raising the ship and goods, on two grounds, one of which was that the owner's negligence precluded him from recovering from the cargo. The law will not assist in enabling anyone to profit by his own wrong.

In the *Argo's* case,† where the vessel grounded in a river and part of the cargo had to be jettisoned to get her afloat, the shipowner was held liable for the loss of the goods thrown overboard, and could not claim contribution from the merchant; this on the ground of careless navigation, although the shipmaster had employed a pilot to take his vessel up the river.

OF THE SALVAGE IN CASES OF TOTAL LOSS.

Although there is a distinction drawn between actual total loss and that situation which is named a constructive total loss, it is not intended that a total loss must be attended with the complete annihilation of the ship, so that it "leaves not a wrack behind," for then total loss could mean only that destruction which proceeds from the burning, or the sinking, or the carrying off of the vessel; but it must be such a destruction that though there may remain "a wreck and residue," the

* M. L. C. Adm. 1881, and Appeal, 1882, Vol. 4, Pt. 6, 428 and 465.

† Adm. M. M. R. March, 1882, 365.

idea of a ship, as to its uses, is gone, and what is left is a congeries of planks, something that may be sold in diminution of the entire loss, but not such as could be restored to a sea-going condition. Anything short of this condition claiming to be a total loss must be one under the name of *Constructive Loss*, which will be treated of hereafter. What is being spoken of at present is a more absolute species of loss, in which part of the material remains, having more or less the semblance of a ship—and this is called the Salvage.

Risk of Proceeds.

The salvage of a ship or of goods, in respect of which the underwriters have paid a total loss or have accepted an abandonment, passes to them as a matter of right. By paying the value to the owner they have necessarily purchased all property in any portion that remains of the interest they insured. The ownership is changed, and the underwriters now stand in the place of the original owners. The agents acting in the matter to realise the proceeds of the wreck are *their* agents. As the underwriters have purchased, with the wreck, all possibilities of the wreck producing more than was anticipated, so the risk of solvency or honesty of the agent, auctioneer, &c., is transferred to them also. The proper mode of proceeding in case of a loss is, for the person in charge of the proceeds to account directly to the underwriters, and for the underwriters to pay the loss in full to the assured; but in the course of actual business it is common, and it is generally more convenient, for the assured to receive the proceeds in part payment of his

loss, and to come to the underwriters for the balance of it. The non-solvency of the parties at a distance is nevertheless at the underwriters' risk if the remittance be made in proper time and in the usual manner; but should the owner, either by negligence or by interference for some particular object of his own, cause an unnecessary delay in receiving the proceeds, and in the meantime the holder of those proceeds should fail,—or should he take upon himself to order a remittance by some unusual or circuitous course and the proceeds should in that transit be lost—the underwriters are not to be the sufferers through his *lâches*, or be made speculators in the particular design entertained by him when he ordered home the proceeds in that circuitous or unusual course: and the owner must be taken to have received the proceeds, although they may never have actually come into his hands.

What the Salvage may consist of.

The underwriters are to take for their salvage all materials, stores, provisions, &c., that belong to the ship. They are also to have any possible advantages, unforeseen at the time of the abandonment or payment of loss. A question has been raised whether iron kentledge was part of a ship's stores so as to pass to the underwriters with the other proceeds. It was tried by the action of *Ingram v. Harrison*,* and it was decided that kentledge was stores, and passed to the underwriters.

* Q. B. 1856. Nisi Prius. Not in reports.

Passengers' Stores.

In passenger ships, the provisions, &c., laid in specially for passengers are not part of the general property insured under the name of ship. They are generally protected by a separate policy, and therefore the underwriters on ship are not to have them.

Chronometers, &c.

Nor are they to have a chronometer, charts or books belonging to the captain ; but if the chronometer, charts, instruments, &c., belong to the owners, the underwriters must have the benefit of them. A shipmaster frequently insures his personal property by a policy on "Master's Effects." They are in general warranted free from Average, or free from all Average ; but not universally so. When free from Average, underwriters are of course not liable for any damage by sea-water ; and as captains' effects, like passengers', are not subject to General Contribution, the insurers thus undertake to protect the master against total loss only. If a few, or a great part, of the effects can be rescued from a loss, which would be total without this exertion, the saving a part will not deprive the captain of his claim as a total loss, giving the insurers the salvage. In the Case of *Duff v. Mackenzie*,* an attempt was made to resist payment on this ground, and the case of *Ralli v. Janson* † was cited in point ; but Justice Williams, in delivering the judgment of the Court, showed the distinction between the subject-matter in these two cases,

* 2 C. B. N. S. 16.

† 6 E. & B. 423.

and established the doctrine as stated above. He showed by an argument *ad absurdum*, that the master escaping from a sinking ship in his clothes would deprive himself of a claim on the underwriters, if nothing but an absolute total loss of every particle were intended. So in *Wilkinson v. Hyde*,* various goods, the property of a person emigrating from this country, were insured against total loss only. All the goods were lost except three packages of small comparative value, one containing saws and the other two window-glass. It was held that the assured's right was established to a total loss; for the saving of a small portion of the interest insured did not defeat his claim. It was also stated that this claim was distinguished from *Ralli v. Janson* by† the emigrant's goods being of different species.

Freight.

It has been laid down, that with the abandonment of a ship to the underwriters by the owners, all profits pass with the chattel to the underwriters, and that to the latter belongs the freight then due. This rule appears to many persons preposterous: because freight being separately an insurable interest, the underwriters on freight are not to be damaged by having their salvage given away to the ship's underwriters. This subject has already been discussed in connection with Abandonment of Ship.

* 2 C. B. N. S. 30.

† 6 E. & B. 423.

OTHER CAUSES OF TOTAL LOSS.

Men of War, Enemies, Pirates, Rovers, Thieves, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes, and People, &c.

The heading gives a very full list contained in the policy of all those causes of total loss which arise from the acts of men unconnected with the ship. They consist of two classes;—the legalised acts of enemies when nations are in a state of warfare, and of the felonious actions of depredators proceeding against, or without the sanction of, law.

It must always be borne in mind that total loss means the loss of ship, goods, &c., to those beneficially interested in them; not their actual annihilation. It does not, therefore, lie on the assured to prove the destruction of the interest insured, but only to show that it has been violently taken away from his possession, so that all benefit and use is lost to him. The capture of a ship, then, by enemies public or private is a good loss as against underwriters. But should there be a re-capture of the property by national vessels of war, before abandonment has been accepted by underwriters and a loss paid in respect of it, or action commenced, the loss is nullified by the property reverting to and revesting in the original owner.

The following case, where the policy was on advances, was decided to be a total loss, although the ship after the occurrence named in the declaration, regained her safety.

A quantity of Coolies were shipped on freight, and were stated to be the chief part of the cargo. Wishing

to effect their escape, they murdered the captain, overpowered the crew, and ran the ship on shore. The ship was afterwards again placed in safety, and was capable of prosecuting her voyage. It was held that this act of the Coolies was piracy, or at least one of the perils insured against, and that the underwriters were liable for a total loss on the policy which was on advances, as the cost of provisions, &c., for these Chinese labourers. There was a total loss as soon as they murdered the captain and forcibly took possession of the ship.*

In the case of abandonment being accepted, but the loss not paid, the underwriters must pay their subscription and take to the re-captured ship. The American law goes farther than this, and will enforce payment of total loss if an abandonment was once rightfully made, although the property is subsequently recovered.

In *Lozano v. Janson*,† Lord Campbell, C.J., delivered the unanimous judgment of the Court in the following case:—The ship *Newport* was seized at Ambriz by the British cruiser *Philomel* in September, 1854, on the ground that she was engaged in the slave trade, and notice of abandonment was given to the insurers of goods on board. She was taken to St. Helena and there condemned by the Admiralty Court: but this was not known in London at the time of the abandonment. At what time the action was commenced is not stated, but in 1856 the judgment of the Admiralty Court at St. Helena was reversed by the Privy Council (*Hocquard v. The Queen*).‡

* *Naylor v. Palmer*, 8 Exch. Rep. 739. Affirmed in error, 10 Exch. Rep. 382; 22 L. J. Exch. 329; 23 L. J. Exch. 323.

† 2 E. & E. 100; 28 L. J. (Q. B.) 337.

‡ Swa. 317.

A portion of the goods was sold damaged at St. Helena, and it was admitted that the bulk of the cargo might be sent on to Loanda, so as to produce something more than the expenses of so doing. It was held that this was a Total Loss as by capture.

If weight be given to this decision, hereafter it will inferentially affect the subject of Constructive Total Losses generally.

1. Here it does not appear that the action against underwriters had been commenced previous to the property revesting in the assured.

2. The *status quo* under which the abandonment was made proved erroneous, and there should not have been a capture; but had the capture been good it would have barred the action against underwriters.

3. The goods could have been taken to their destination and sold at some profit after all expenses incurred.

4. "A new rule seems to us to be laid down by Bayley, J., in *Holdsworth v. Wise*,* that the subjects of insurance must be in existence under such circumstances that the assured may, *if they please*, have possession, *and may reasonably be expected* to take possession of them."

Thus it would seem that the assured's volition, prospects of market, &c., are again imported into the question which it was the strong endeavour of the law, previous to this decision, to exclude.

The list given above contains almost every possible contingency of this particular kind; but no list and no statutory enactments can be made to supply an answer to every question that may arise upon the most elaborate legislation. Accordingly we find, during the Crimean

* 7 B. & C. 794.

war, an inquiry as to the meaning of *takings at sea*; whether the firing into and sinking a vessel, which act was done from a fort belonging to enemies, could be construed into a *taking* of that vessel, so as to bring the loss within the meaning of the policy. The cause came before Lord Campbell, in July, 1855, and the circumstances were these :—

It was an action brought by *Powell & Co.* against *Hyde*, an underwriter,* who had subscribed a policy on the cargo of the ship *Bedlington* from Galatz to London. The policy contained the usual printed clause against “all perils of the seas, men of war, pirates, and all other perils,” &c.; but was declared “free from capture or seizure, or the consequences thereof.” The vessel commenced her voyage, with her cargo on board, down the Danube. There had been firing on both sides of the river, by the Russians on one side, and by the Turks on the other. The Russians had batteries and gunboats on their side. On March 19, 1854, *i.e.*, nine days before war had been declared between this country and Russia, the *Bedlington* as it passed these gunboats hoisted the English flag; but the Russians, notwithstanding, fired into her, and sank her. No attempt was made to capture the vessel, but the crew were taken prisoners. The ship it appears might have been captured with the greatest ease. Lord Campbell directed that a verdict should be taken for the plaintiffs on the ground of the loss arising from “perils of the seas, pirates, &c.,” giving the defendant leave to enter for a nonsuit.

A restricted sense was given to the terms *restraints and detainments of all people*, in the case of *Nesbitt v.*

* 5 E. & B. 607.

Lushington; * a restriction, probably, unintended by the framers of the policy, for they had amplified the meaning of the word *people* by adding "of what nation, condition, or quality soever." A vessel laden with corn was driven into a harbour on the coast of Ireland during a time of scarcity, the people thereabout came on board in a tumultuous manner; took away the command of the ship from the captain and crew; weighed her anchor and drove her upon a reef of rocks, where she was stranded: they then compelled the master to sell all the corn to them at a certain rate, except about ten tons, which were lost. A verdict was given against the assured; for the Court held that the persons who came on board and insisted on this forced sale, and who might, if they had so determined, have taken the corn without any payment at all, were not a *people* in the sense of the policy, and that therefore upon that plea the action would fail.† It may be so; but the decision seems opposed to that fulness attempted to be given in the policy, which, short as the whole instrument is, is here even exuberant in its enumeration of this species of rapine.

An embargo is recognized by our law as a *restraint and detainment*; and loss happening in consequence of a ship being detained in this way in her loading port, after the commencement of the risk, was held to be one for which the underwriter was liable under the above words. (*Green v. Young.*)‡ But there is an exception, apparently on grounds of national expediency, that if the ship of a

* 4 T. R. 783.

† Nor was the loss or damage allowed to be in the nature of General Average.

‡ 2 Salk. 444.

foreign owner insured here be arrested by an embargo laid on by the government of the assured, he cannot recover for a loss in our courts. The point, however, can scarcely be said to be established.

The case of *Cory v. Burr** has been more than once mentioned in this volume. The loss was declared to be by capture. The cause of the capture was an offence against the fiscal and municipal law of a friendly nation. Smuggling stands in a peculiar light in the eye of English law. To smuggle into a country, though friendly, is no offence against our own laws ; and at the same time we admit that the authorities of the State into which articles have been smuggled are perfectly justified in making seizure ; and such seizure would involve underwriters who have not disclaimed "capture."

To sum up, we may say that a good capture, or even an embargo, gives the right to the assured to abandon immediately to his underwriters and commence action ; by which he will recover, if the property remain in the same state at the time of bringing action. In such a case, steps taken to recover the property would be taken for the interest of the underwriters, and should only be undertaken by the assured at underwriters' request, and as their agent.

In the case of the *Sir Robert Peel* † the proceedings appear to have been taken by the underwriters themselves, who sent out a special agent to act for them, and they thus became responsible for his acts.

If an enemy's ship be captured having on board

* Appeal, July, 1882 ; H. of L. 30th April, 1883 ; *Times*, 1st May, 1883.

† Not reported.

neutral goods, though the goods are not prize, they are carried with the vessel into a port; and, practically, expenses will be incurred for their liberation, and forwarding to their place of destination. This being a result of hostilities, the underwriters will be looked to for payment of these expenses, on a policy against all risks.

Another reason for obtaining precise instructions from the insurers in capture cases is, that it is difficult to fix underwriters with expenses creating a loss more than total: consequently, in appeals of very doubtful result, definite arrangements should be made with underwriters before commencing any proceedings towards liberation.

For further information on the rather obscure and purely legal subject of embargo, one that does not at present frequently affect policies of insurance, the reader must be referred to the causes of *Rotch v. Edie*,* *Touteng v. Hubbard*,† and *Green v. Young*,‡ *inter alia*. The editors of Maude & Pollock|| thus tersely distinguish between Arrest and Distrain in the words of Brett, L.J. "Arrest is the taking of goods, with the intention of restoring them, at one time or another; Restraint is preventing the goods being got away, without laying hands on them. *Rodocanachi v. Elliott*.§

Johnson v. Hogg¶ follows the reasoning of *Cory v. Burr*. The ship was boarded by natives on the coast of Africa who plundered and injured her, so that she was abandoned as not worth repair. The policy was free

* 6 T. R. 413.

† 2 Lord Raymond, 840.
L. R. 8 C. P. 659.

‡ 3 B. & P. 298.

|| Page 488, note, 4th Edit.

¶ L. R. 10 Q. B. D. 432.

from capture and seizure, and the underwriters were held exonerated from the loss.

FURTHER REMARKS ON TOTAL LOSS.

Application to Policies.

When an interest has been insured by two separate consecutive policies, it has sometimes to be decided on which of the policies a loss properly falls,—as the cause of loss may have occurred during the currency of the former policy, and the effect, or actual loss, may have been fulfilled after the commencement of the second policy. Of course it is necessary, to use a proverbial expression, “to put the saddle on the right horse.” Right reason seems to point out that it is to the actual *cause* we must look in determining the question. If it can be clearly established that the ship received her death-wound during the pendency of policy A, that policy must bear the loss alone, and not B, the succeeding one. But the cause may not be so clear. The damage which produces, finally, her loss may be progressive. Though the ship may not have been quite safe at the termination of the first policy, though injury may be shown to have begun before its conclusion, yet the event of the loss may be at a sufficient distance of time after the lapsing policy of A to attach the loss to policy B. The ship may have received damage which went on increasing after the commencement of policy B, and it would be difficult to show that the wound received during the running of the preceding policy necessarily led to the ship’s destruction, or that there were not some sufficient probabilities in favour of the ship escaping

when that first policy ran out. Thus the loss would properly be made to fall on policy B. It may be suggested that an equitable mode of meeting such a case would be to apportion the loss between the two policies. This would open the door to many questions for the future, and would be an expedient not very advisable to resort to. Besides, it will be shown, when treating of the subject of seaworthiness, that the words "lost or not lost" in the policy provide for the chance of a ship at sea being unseaworthy at the inception of an original or a succeeding policy. The case is different if a ship return to port before the first policy terminates and the second commences; for then, if defects be left in the vessel unrepaired and she sail under a new policy and be lost, the owner would lose his remedy on both:—on the first he would not be able to show that any loss had occurred, and on the second he would be met by the plea of unseaworthiness.* And another difficulty which would present itself practically, in attempting to discriminate between the quantum of loss on the two policies as determined by the causes of loss happening on each, would be the almost impossibility of getting decisive evidence. The ship being lost, it could only be

* The judgments, delivered in *Fawcus v. Sarsfield*, 6 E. & B. 192; *Thompson v. Hopper*, 6 E. & B. 937; and *Gibson v. Small*, 4 H. of L. Cases, 353, draw this distinction between *voyage* policies and *time* policies, that on the latter there is not an implied warrant that the ship is seaworthy at the commencement of the risk. This is in favour of the owner in cases of a consecutive policy commencing whilst the vessel is at sea. It also relieves him from any warranty of seaworthiness on a time policy, whether his vessel is at sea or in port,—even the place of the owner's residence.

The subject of such distinction is, I perceive (1884), beginning to invite attention.

the observation, the memory, and surmisings of the ship's company that would be available as data. And however accurate their memory, &c., might be, one most material part of the necessary evidence must be wanting, that of an inspection by surveyors of the ship itself.

Loss cancels the Policy.

The loss falling on a policy cancels that instrument, though it be for time. The premium has been earned by the underwriters for the whole period, even though the policy may contain a clause dividing the premium, under certain conditions, and providing for a return for each month the vessel is not actually at sea. But though the loss happen in the first month of the insurance, there will be no return of premium.

With mutual insurance clubs the arrangement is different.

Aggregation of Claims on a Policy.

There can be only one total loss on a policy, but a much larger sum than the amount of the policy may be claimed on it. On a single voyage there may be a General Average Contribution and a Particular Average for repairs of damages, and after these there may happen the total loss of the ship. Thus, claims to the extent of 150 per cent. or upwards may be aggregated on a policy. On a policy for twelve months it is easy to conceive a still more fatal series of disasters to arise, so much so that it might give occasion to our Hibernian neighbours to wish that the total loss had been the first of them. The proper means of providing against this contingency,

on a single voyage, is to insure the disbursements that have been made on account of damages at an intermediate port,—the underwriters paying their proportion of the premium. Then, if the Average be followed by a loss, the original underwriters are relieved from all beyond the total loss. A bottomry bond given for the expenses would have the same effect, but the former is the more inexpensive mode of relief.

It may strike some persons in reasoning on the liability of an underwriter on a policy, that a single premium should only cover a single risk ; and that although expenses for the purpose of rescuing a ship from loss might properly be allowed in addition to a subsequent total loss, yet repairs stand on a different footing : that if a ship is damaged, if part of her materials be carried away, such for instance as her boats, her masts, her bulwarks,—there is, *quoad* those materials, a total loss already suffered ; and that when underwriters pay for the reinstatement of those materials they have paid all they can be called upon for in respect of so much of the ship. They may compare their case with that of goods damaged and partly destroyed, on which they could not be compelled to pay a partial loss and a total loss ; that is, they could not be compelled to pay a total loss on that portion of the goods on which they have already paid a piecemeal loss. To illustrate which more forcibly, suppose a ship laden with sugar to have part of the contents washed out by the sea, and she puts into her original port. Here the merchant replaces the quantity destroyed with other sugar ; perhaps a few bags in each mark. Suppose the documents to be forwarded to the underwriters, who pay the loss *pro tanto*. The

ship again sails and is lost. The underwriters would not pay a full total loss the second time. They would say, We paid a loss on part of the interest we insured, and now we are ready to pay a loss on the portion that remained when the ship sailed a second time; but we do not for one premium undertake the risk on the new sugar shipped. This is perfectly reasonable. The underwriter on ship may say, And my case differs only in this, that the parts of a ship are rather more connected than the parts of a cargo. In the latter, a bag is separable from a bag; but it may be that only *part of each package* was destroyed, and was replaced by filling up; and if so, it approaches very near to my own condition. The masts or the boats of a ship are as separable, as distinct from the ship itself, as bag is from bag; and if it be urged that a mast is an integral part of a ship, I answer, so was the portion of each bag which was destroyed and replaced an integral part of that bag and of that cargo, and therefore our cases are similar; and we ought not to be called upon on one policy to replace masts, boats or other parts of the structure of the ship, and afterwards to be made to pay a total loss of the very things which we ourselves have given the assured.

We will here leave the argument,—confessing that the parallel does appear to run very close, and almost seems to bear out the propriety of an underwriter being allowed a new premium on the amount of repairs done to a vessel which again proceeds to sea at his risk. As the matter stands, the whole interest in the ship insured revives after repairs effected, though at underwriter's expense.

Frequency of Total Loss.

It has been given as a mercantile axiom that risk is the mother of profit. This is perfectly true with regard to the system of insurance. The data on which underwriters found their scale of premiums are very imperfect and unsystematic, and, also, they are constantly fluctuating with the season and other disturbing circumstances, of which if it were attempted to take the whole into the problem of probability—(I mean upon some exact system, and not by mental guesswork)—the cycles would necessarily be too great to become practically possible or useful.

The manner in which an underwriter arrives at his estimate of the value of a risk is attempted to be shown in my *Manual of Marine Insurance*. It is done by a species of mental arithmetic, somewhat in the way in which Bidder and other prodigies of calculation arrived at their results—instinctively rather than describable. The probability is rapidly computed by the underwriter from all the elements concerned; and these are always numerous.

I thought it desirable in former editions to introduce a short numerical survey of marine casualties, resulting in either total or partial loss of ships and cargoes, and, in too many cases, in destruction of human life. I pursue the same course now. The figures produced address themselves to the reader's curiosity, but far more to his interest; and afford him subjects for thought and consideration; as whether marine casualties are increasing or decreasing in ratio to the enlarged mass of our maritime commerce; and whether they are in a

measure avoidable, and if so, by what means. My information is derived from the Blue Book produced by the Board of Trade, collecting in abstract the returns made to that Department of Sea Casualties reported to it during the year 1881—1882. Such tables do not, it is true, affect the doctrine of Average, but they are collateral to the general subject, and force into prominence the advantages, and also the induced harm, of a system of marine insurance.

First. The aggregate casualties to British and Colonial vessels during that year, reported was—

- | | | |
|-------------------------------|---------------|---------------|
| 1. Totally lost, and missing, | 1303 vessels, | 378,424 tons. |
| 2. Serious casualties . . | 1622 „ | 696,971 „ |
| 3. Minor casualties . . | 3470 „ | 1,410,123 „ |

Of the first, 174 were steam vessels, tonnage 103,284 ; and 1129 were sailing vessels, tonnage 275,140.

Of the second, viz., Serious casualties :—Steamers, 508 ; tonnage, 377,968. Sailing vessels, 1114 ; tonnage, 319,003.

Of the third, viz., Minor casualties :—Steamers, 1039 ; tonnage, 801,054. Sailing vessels, 2431 ; tonnage, 609,069.

Average numbers for six years, including 1881—1882 * :—

Lost and missing :—Steamers, $121\frac{2}{3}$; tonnage, 74,645. Sailing vessels, $1005\frac{2}{3}$; tonnage, $239,447\frac{2}{3}$.

Serious casualties :—Steamers, $488\frac{1}{6}$; tonnage, 335,469. Sailing vessels, $1196\frac{2}{3}$; tonnage, 335,459.

Minor casualties :—Steamers, $821\frac{7}{8}$; tonnage, 569,904. Sailing vessels, $2451\frac{1}{6}$; tonnage, 538,622.

Turning now to the more gloomy subject of human life lost at sea, there were lost in British and Colonial

* The numbers of serious and minor casualties for 1877—1878 are incomplete, owing to some papers of statistics having been burnt.

vessels, on the English coasts and abroad, in the year 1881—1882, as reported to the Board of Trade—

	3277	lives from British vessels.
and	701	„ Colonial „
	<hr/>	
	3978	

Of these were lost from steamers . . .	1276	lives.
„ „ sailing vessels . . .	2702	„
	<hr/>	
	3978	

Of this serious reckoning 3612 were those of mariners.
and 366 „ passengers.
<hr/>
3978

Loss of life at sea varies very much in different years : thus—

In 1876–7 the number of deaths was	3051
In 1877–8 „ „	2452*
In 1878–9 „ „	2064
In 1879–80 „ „	2155†
In 1880–81 „ „	2923‡
In 1881–82 „ „	3978

The last year reported has the sad pre-eminence of counting 1449 lives lost above the average of the previous five years.

As some compensation for the record of lives lost, it is gratifying to observe the great, and on the whole, increased number of lives saved.

* The mortality in 1877–8 includes 318 lives lost in H.M.S. *Eurydice*.

† The mortality in 1879–80 includes 281 lives lost in H.M.S. *Atalanta*.

‡ The mortality in 1880–1 includes 143 lives lost in H.M.S. *oterel*.

During the year 1881-82 there were saved on the coasts	
of Great Britain	2950 lives.
On foreign coasts	3755 „
From ships at sea	2368 „
<hr/>	
Making a total of.	9073 lives.
Of these the rescue was by means of rocket apparatus	
and assistance from shore with ropes, &c.	329 lives.
Life Boats	196 „
Luggers and small craft	507 „
Ships and steamers	2355 „
Ship's own boats	5257 „
Life-buoys and appliances kept on board	1 „
Individual exertion	10 „
Other means.	408 „
<hr/>	
	9073 lives.

What the “Other Means” consist of it is difficult to guess.

It is very striking to notice that in spite of the large increase of Life Boats and Stations, the number of persons saved by them is but little more than two per cent. on the gross total.

In conclusion, the lives saved during the past six years are the following, viz :—

Lives saved from shipwreck in—					
1876-7 on our own	} 4795 ;	foreign or	} 8990 ; total, 13,785 lives		
coasts,					
		British pos-			
		sessions, &			
		at sea			
1877-8	„	4070	„	8121	„ 12,191 „
1878-9	„	3302	„	9850	„ 13,152 „
1879-80	„	2923	„	8282	„ 11,205 „
1880-1	„	5071	„	6632	„ 11,703 „
1881-2	„	4066	„	9073	„ 13,139 „

Giving an Average number of 12,529 lives saved, by all means, per annum.

The lives saved by Life Boats, direct, on British and Foreign Coasts were, in—

1876-7 . . .	700 lives.	1879-80 . . .	430 lives.
1877-8 .. .	667 „	1880-1 . . .	717 „
1878-9 . . .	515 „	1881-2 . . .	671 „

The Royal National Life Boat Institution claims for the year 1882, 741 lives saved by life-boat services simply; and 143 lives by fishing and other boats, to which the Institution has granted rewards.

To persons unacquainted with the statistics of commerce the details given above will appear remarkable. They will see in them ruin to merchant, to shipowner, and insurer; and will, with Arragon, think of any one who henceforth makes his venture on the waves, that he,

—like the martlet,
Builds in the weather on the outward wall,
Even in the force and road of casualty.*

Yet losses such as these have not proved ruinous to any of the classes named. They are the incidents of maritime commerce,—partly necessary and inevitable, partly avoidable in future. They are the gigantic misfortunes of a gigantic trade.

Collisions had, for years, been a constantly increasing quantity, and still present themselves in too great proportion. The greater number, as might be expected, occur in our own narrow seas, rivers, and harbours.

As ships propelled by steam proceed without or against wind and tide, and are in motion when sailing-vessels are detained at anchor, they necessarily throw out cal-

* *Merchant of Venice*, II. 9.

culations, and interfere with the precautions which would mainly insure safety if only sailing-vessels were to be provided against.

OF CONSTRUCTIVE TOTAL LOSS.

Definition.

We have hitherto principally considered those losses where the ship was either absolutely sunk, destroyed, or run away with, or was in a condition which approached so nearly to a complete destruction that what remained of the vessel was an innavigable collection of timbers, planks, &c., “whose only business is to perish;” or, at any rate to be broken up and used for other purposes. We now approach a different kind of loss; total neither in the effect upon the ship itself, nor by the absorption of all the proceeds of a sale; but so far demonstrably total, in a monetary point of view, as to lead to an abandonment of the property by the original owner. Incidentally this position has already been mentioned under the head of Total Loss, but the subject requires to be entered upon more at large in a separate section. When such a concatenation of circumstances arises that to send a vessel forth out of a port of refuge in a seaworthy condition would cost more than the value of the ship itself when afloat, then the *property* may be considered *lost*, though the *thing* itself remain in existence in its original form of a ship. Thus we speak of a landed estate being lost when it is so mortgaged that a sale of it will scarcely pay the mortgagee his advances, and the original owner's property in it is merely

nominal: for it has really been already sold to the lender of the money, who holds the title-deeds, and has everything short of a formal possession of the estate. When he forecloses, then the property is absolutely gone and lost, although, of course, the land itself remains where it was.

Misunderstanding of its Nature.

Much has been said and written about Constructive Total Loss. Its name has probably itself been instrumental in producing uncertainty and provoking discussion. It has been the cause of frequent legal warfare; and decisions have sometimes appeared to be in conflict with each other. It has been the subject of numerous *Nisi Prius* trials, for it is rather on the facts of separate cases than on the leading principles that litigation has been resorted to. Yet it must be admitted there still remains some uncertainty about this species of claim, and it is difficult to trace, with careful attention, consistency in results. Those who have not studied the subject object that claims of this nature are made when clearly there has not occurred a total loss; when, indeed, there has been, in the ordinary sense of words, no loss at all; no total loss even as regards value, for there often remains a considerable worth in the thing condemned and abandoned. What is its nature then, and how can it be described in one sentence? It is the disappearance of ultimate benefit, though the thing remains; the hypothetical loss of property, considering property the embodiment of value. It is also the loss of use by the intervention of recognized obstacles. Constructive loss results from such a state of things that an article of

value, injured or in other persons' possession, cannot be restored or retrieved except by an outlay as great as or greater than the original cost, or the value it would have after being so redeemed. In this sense the *money-existence* of a thing—of a vessel, for instance—may be demonstrated to be destroyed, or to be in such imminent danger, that to proceed to rescue the ship and keep it in its original ownership will certainly involve as much expense *as to rebuild the ship, or to build a new ship in lieu of it*. And to build a new ship is a different thing to repairing an injured one. When, therefore, we see what the certain result will be if things take their course and further expenses be incurred, we arrest it on its road to ruin, and realize its value whilst any value can be secured. Thus whilst we have not an actual loss we have circumstances which would amount to something that would be equivalent to a total loss of value, and by seizing the property in its downward progress we have by a voluntary act averted the actual loss of all, and saved something from the ruin.

It is not therefore the name which rightly should detain us, because there are questions of real practical difficulty connected with this species of claim which are of more importance to discuss,—the liability of an underwriter, and the concurrence of several causes in bringing about a constructive total loss.

Legal View.

“When we speak of a total loss,” says Justice Park, in his work on Insurance, “we do not always mean to signify that the property insured is irrecoverably lost, or gone; but that by some of the perils mentioned in the

policy, it is in such a condition as to be of little use or value to the insured, and so much injured as to justify him in abandoning it to the insurer, and in calling upon him to pay the whole amount of his insurance, as if a total loss had actually happened." And our courts of law give us frequent proofs by their judgments that combinations of circumstances may arise,—their first causes being in perils for which the insurers hold themselves liable, amounting to something as disadvantageous to the assured as if his ship were entirely lost. Such circumstances are to be construed into total loss: and thus capture by enemies, excessive damage by storms or by stranding, have been fruitful grounds for constructive total losses. It has been decided, too, that the *species* of a thing remaining is not an answer to a claim for total loss, if all use of that thing be lost through the perils to which it has been exposed.

Usual Forms of Constructive Loss.

The expenses of restoring what has been destroyed and of repairing what has been injured about a ship, are the most common form of a vessel's *constructive death*. The difficulties of carrying on repairs, or of procuring materials for those repairs; the inability to raise means for paying the necessary disbursements arising in a foreign port; or the exorbitant rate of interest demanded for money required for such disbursements, are the usual proximate causes which lead to the abandonment of a ship to her insurers. The rules which courts of law in this country have laid down to determine in such cases the question of *total loss* or *not total loss* appear to be

these :—that if the expenses of repairing a damaged ship would exceed the value of that ship after being repaired, she may rightly be abandoned to the insurers as totally lost. And again, the course of conduct which a reasonable man *uninsured* would pursue under similar circumstances,—whether he would proceed to repair his vessel and continue the voyage, knowing the expenses that would have to be incurred and the difficulties which must be overcome in so doing ; or whether he would voluntarily abandon his adventure by selling the ship in her then condition,—will be a guide for determining the question. Whatever course the jury finds a prudent uninsured owner would probably pursue, will be conclusive as to the underwriter's liability for a total loss.

Difficulties of applying Rules.

But whilst definite rules of law are thus fixed, the difficulty of applying them remains. Each separate case must rest on its own merits. In scarcely any two instances are the entire circumstances quite the same. The evidence is often doubtful and incomplete.

One great difficulty in such investigations consists in that the test to ascertain a loss or not a loss depends on a comparison of figures ; and some of these figures must be hypothetical, sometimes all are so. Thus, a ship damaged by sea-perils enters a port where she might be repaired. We require three separate values that it may be determined whether she should be repaired or abandoned and sold. All these values must be taken on estimate. All depend, then, on opinion and judgment. We have to find, first, what is the actual value of the

vessel as she lies in the port of refuge ; secondly, what it would cost to have her repaired and put into a seaworthy condition ; and thirdly, what her value would be after being so repaired. Now many persons incline to think that the most difficult of these estimates, viz., that of the ship's ultimate value, her value after the required repairs, can be dispensed with by taking the datum of the value of the vessel as declared in her policy of insurance. There are, however, several reasons why this element cannot be adopted ; one reason being that a policy valuation is a very various form of contract, depending on choice or fancy or some particular necessity ; or some enforced requirement of the underwriter, who finds safety in high valuations. There are, however, some mutual clubs and one leading London company, at least, which do take the declared value, or an agreed nominal value per ton, as the basis of comparison. But in the eye of the law, as hitherto declared, the valuations must be all collated in one place, and that the port of repair. The insurers just mentioned must be understood to have contracted themselves out of this rule of law.

When the three values have been ascertained at a port of distress and repair, it remains to compare the value of the ship after her restoration with the amount required to restore her seaworthiness. If the latter is in excess, then it is usual and also equitable to abandon the ship to the underwriters ; and failing any distinct directions from them, to sell the vessel.

But in determining whether the sale of a damaged ship is justifiable, a fresh consideration is often brought in. What would a prudent, uninsured owner have done ? It is difficult to give a certain answer to this often

recurring question ; for, in the first place, the probable actions of another person can only be guessed at, and that doubtfully ; secondly, a prudent shipowner is not often uninsured ; and again, he may have, being uninsured, special motives which induce him to retain and not to abandon his vessel. There may be a freight to earn ; a considerable sum, it may be, only receivable on the arrival of the ship at her destined port and the delivery of her cargo. So there is strong inducement to an owner, uninsured both as to vessel and freight, to repair and avert a loss. The contrast to this is the insured owner ; fully covered both on ship and freight, who in case of constructive total loss recovers the full value of his vessel, and gets a more immediate payment of freight ; and, as he has not to complete his voyage, a greater result than he could have obtained by an arrival at the port of destination. Consequently, speculations upon the conjectural course of an uninsured owner may generally be dismissed as unfruitful.

Should the estimates made at the port in which the ship in distress from damages has entered be insufficient to maintain a claim as for total loss against underwriters, recourse must be had on the policy for a Particular Average : and if the owner has chosen to sell his ship (so closing his insurance) instead of repairing her, and which he has a perfect right to do, the estimates for repairs must still be the evidence as to the amount of damage sustained and claimable from insurers. And there is no limit to the amount of such claim for Particular Average except the declared value in the policy, so that if the amount of necessary repairs, thirds for melioration having been first deducted, amount to the

entire value of the ship, a claim can be enforced on the policy, up to one hundred per cent., as a Particular Average, but not as for a total loss. And in such case, although the owner have used his option and sold the ship, the underwriters are not entitled to deduct her net proceeds, as they would have done had the claim been made on them for a loss. The interesting and henceforward leading case of *Pitman v. Universal Insurance Co.** will be studied with advantage as including this and other principles of importance.

Contributive Causes of Constructive Loss.

Under the expression constructive total loss, the notion of insurance is always intended. The expenses and adverse circumstances are built together, and are shown to overtop the value of the thing itself even after the expenses have been lavished on it; but this constructive sense of the word loss would rarely be used except as it affects a policy.

It is, however, quite conceivable that a ship or goods might, in a true sense, be constructively lost, and yet not affect the policy by which it or they are insured. The causes of the loss may be natural decay, inherent defects (*vices propres*), fall of markets and other mercantile risks, which are not those extraordinary casualties contemplated by a marine policy. It is not enough, therefore, to show that an interest has been constructively lost, but that the cause of the loss is in sea-perils insured against. This is sufficiently clear.

But an insured interest may be lost by a combination

* Court of Appeal, April 24, 25, June 6, 1882, M'L. C. p. 544, N. S.

of causes, some natural or merely mercantile, and some indemnified by the policy. This is a case of greater difficulty to deal with.

Should a ship sink at sea, and the underwriter determine to resist paying a total loss on the ground of unseaworthiness or natural defect, the onus of proof lies on him to show the ground of his resistance,—a thing generally difficult or impossible to do, inasmuch as either all evidence will have perished with the vessel, or, if the master and crew are saved, they will not often lend their aid in preventing a claim of the owner on a policy of insurance. Should it happen, however, that owing to such causes a vessel is forced into a port of refuge, and that she is there abandoned and, constructively, totally lost, the underwriter might escape by producing evidence as to the cause of her loss. But let it happen that two or many causes conspire to eventuate the constructive loss of a vessel, some of them being perils for which underwriters are responsible, and others those for which they are not liable, the inference, which at least seems an equitable one, would be that the underwriter's loss is limited to such a proportion as can be shown to proceed from circumstances, the risk of which he took. But practically it occurs that the *whole result* of such mixed causes is cast upon him, the owner abandoning the ship, and claiming a total loss upon his policy. Such, it must be said, is the tendency of the majority of late cases.

Case of the Broxbornebury.

The case of the ship *Broxbornebury*, tried in the Court of Common Pleas several years ago, assisted to establish

this position. It affirmed for a time the principle that when several causes concur in producing the abandonment and consequent sale of a ship, underwriters are liable to the full extent of their policy, with benefit of salvage, although one or more of the causes which conducted to the condemnation were of a nature which the underwriters never undertook to insure against.

The vessel was thirty years old: she had been surveyed and repaired, and classed as a red diphthong. She sailed for the East Indies, encountered a violent hurricane, and was carried into Mauritius. There she was surveyed, and her stern-post was found to be badly started, her bowsprit-beam sprung, her upperworks seriously damaged, and the vessel was leaking badly. The surveyors, beyond this species of damage, found some of a different kind. They found the ends of the timbers so decayed that on putting their hands into the air-holes they brought out handfuls of rotten wood. One surveyor expressed himself that the ship was "as rotten as a pear." The inspectors then ordered the copper to be stripped off, and the vessel to be repaired. Before, however, proceeding with the repairs, estimates were procured from shipwrights of the cost of effecting them. The estimates amounted to upwards of 40,000 dollars, equal to about 8,000%: and to this sum would have to be added bottomry premium, and some other charges. Upon the ground of the great expenses necessary to repair the vessel and send her to sea again, she was condemned, and was broken up. The owners claimed for a total loss on their policy. The underwriters resisted this claim, and paid into court 50 per cent. of the vessel's value in full of all claims on themselves for

repairs and expenses. They also brought evidence to prove that all the damages set forth in the documents for which they as underwriters were responsible could have been repaired at Mauritius for about 2,000*l.*, and in England for a less sum. The policy contained a clause admitting the seaworthiness of the vessel when the risk commenced, and the defendants did not seek to impugn the fact of her seaworthiness. The learned judge, in directing the jury, told them that the ship's seaworthiness at the time of the hurricane was admitted; and the law stood that if the expenses of repairing a ship exceeded her value after repairs, it amounted to a total loss, and they must find for the plaintiffs. The evidence on the part of the owner had been that the value would have been less than those repairs, and the jury found accordingly.

Here, then, the whole question was in issue. Here were two distinct causes at work, the joint result of which was to construct the loss of the ship. Here was a great amount of natural decay discovered when a view was taken of the injuries sustained at sea. The underwriters freely admitted their liability in respect of the damages by sea-perils: but to repair these damages so as to put the vessel into the same condition as she was previously to the hurricane is one thing; to restore her to a perfectly sound, stout, and seaworthy state is another. In the former case the underwriters stand by the terms of their agreement, and indemnify for those losses which they engaged to make good; in the latter case they would be doing far more than they undertook; they would be putting the vessel into a better and more efficient state than that in which she had previously

been: they would be rebuilding the frame, restoring a time-destroyed constitution, and giving new youth to a ship that had traversed the waters for thirty years. A circumstance of great weight must, however, be remembered, that the seaworthiness of the ship at the commencement of the voyage had been admitted in the policy.

The question, then, is, to what extent are the underwriters interested in the large sum that was required to put the ship in such a condition that she could emphatically be pronounced seaworthy: and how are their rights affected if the alternative be chosen of selling the ship, in preference to entering upon so enormous an expense?

It has been stated, above, as the rule in these cases, that whatever a prudent, uninsured shipowner would do under the circumstances is the course which an owner insured should pursue. The rule seems reasonable, and would be conclusive against underwriters, supposing that *all* the expenses took their rise from sea-perils which those underwriters insured the owner against. But in the case before us it was not so. A very considerable part of those estimated expenses arose from causes which underwriters never guaranteed, and for which it is notorious they are not liable by the terms of the policy. It is a very different affair to abide by the consequences of stipulations we have made, and to suffer by those which come in extraneously to our contract, being such as we never took the onus of on ourselves.

In the course of the argument the late Lord Truro, then Serjeant Wilde, said, "I can distinguish no difference whatever between an absolute total loss, and the

case where expenses would exceed the value of the vessel when repaired, called a constructive total loss." In the effect upon the underwriter nevertheless, there are material differences between the two positions.

When a vessel is entirely lost by her sinking or by fire, no doubts can be entertained as to the fact of her loss: and although suspicions may arise occasionally, and the destruction of the ship may be attributed to previous unsoundness or some other cause not touching the underwriter, yet the proofs being lost the question cannot be mooted. Not so, however, in constructive losses, where expenses are built up till they reach or exceed the entire value of the thing insured; because in the latter case the separate members and materials of this consuming expense may be defined, and they may be distinguished into those which affect an underwriter and those for which he is not liable. Without denying that the thing is constructively destroyed, the work of destruction may be shown to have been carried on by two or more forces, and it may be possible to apportion exactly the resultant to the two or more powers. Thus, then, it might be reasonably held that, *though the accumulated expenses are indeed tantamount to the loss of the subject-matter of the insurance, they are not necessarily tantamount to a total loss as regards the insurers.* The perils insured against by the underwriters may operate, suppose, to the extent of one-fourth of the whole necessary expenses; other defects, not insured against, may create an expenditure equal to the remaining three-fourths of the value. Owners ought not to be allowed to cast all the onus on the underwriters and say, "Causes of a mixed nature have resulted in the loss by

sale of the ship ; and although three-fourths of those mixed causes are attributable to us, and only one-fourth to you, nevertheless, we abandon the whole concern to you, and we claim the total value insured, the same as if the loss proceeded *entirely* from the risks you insured us against by the policy."

It is sometimes said that in a valid case of loss, for example, where the expenses somewhat exceed the ship's value in a restored state, it is indifferent to the owner whether the underwriter completely restore the vessel to her pristine state, or pay him the amount insured. This is not strictly true. There is a difference in favour of the shipowner, which he will not be slow to discover, on the side of total loss. For if a ship be repaired, at whatever cost, one-third is deducted from those repairs by the underwriters, and is paid by the owner on the score of *melioration* ; whilst in paying a total loss, no deduction is made for the deterioration which the ship may have undergone before she was destroyed. The temptation to owners, and captains acting on behalf of owners, would be too great if they were allowed the option in cases of damages in foreign ports, either to repair or to sell the ship. The advantage to owners attending the latter alternative are so well known that the course would be constantly adopted.

In fire insurance companies the option remains with the office, after a fire, either to rebuild the premises which have been destroyed, or to pay the amount insured, and they select the plan most economical to themselves ; and this can never be objectionable to the assured if he be not over-insured, and does not seek to make an unfair profit out of the misfortune. As soon as the people

insure with a view to *gain by a loss* the whole character of the transaction is changed, and the system of insurance loses its innocence and value.

This particular case of constructive loss has been entered into somewhat at length because it embraces nearly all the points which emerge from the subject. The result may seem unsatisfactory in principle; and it has been followed by other causes of a similar kind, in some of which a different conclusion has been arrived at: but, on the whole, the majority of decisions leans towards the side of making underwriters liable as for a total loss, with salvage, if some definite effects of sea-perils conduce to a condemnation of the ship.

Most of the mutual insurance clubs on wooden sailing vessels disclaim damages below water-line, or bends, unless occasioned by stranding or contact. And where a claim is made on such associations for a constructive loss, they exclude the cost of repairs below water from the total estimated estimate of repairs necessary; the rejection of which items frequently, by altering the proportions, defeats a claim as for constructive loss.

Perhaps, on the whole, the subject of contributive causes has not received so much attention as seems due to it.

Bona fides of the Master necessary, and good judgment on the part of Surveyors, &c.

It was clearly laid down in another case, that of the *Alfred*, that the absence of *bona fides* in the conduct of the master and of those concerned in the condemnation and sale of a ship, is fatal at once to a claim on the

underwriters for loss ; and that beyond its being proved to the jury that everything was done *optimâ fide*, it must be shown to their satisfaction that the best judgment had been formed which the circumstances admitted, and which men of prudence and ordinary intelligence could have arrived at. It is true indeed that such men, with all their discretion and with the very best intentions, may judge erroneously as to results, but that error of judgment would not defeat the owner's claim on his insurance if it were the best opinion that a prudent and disinterested person was capable of forming. To demand more than the best capabilities of people would be somewhat the same as to say, that if a rock had been softer than it was, a ship might not have been destroyed by striking on it.

It is of the utmost consequence that great discrimination and care should be used in a case where the event partly, and often in a great measure, depends on men's judgment and volition. Our voluntary actions, however much we may desire to do justly and honestly, generally labour under a bias from which the strongest can scarcely free themselves. Here, the stated opinion of skilled persons turns the scale, and decides whether a certain state of things shall be, or not be, a loss recoverable on the policy of insurance. Lord Mansfield said in an analogous case, viz., in a claim for total loss on goods, "the merchant cannot elect to turn that which at the time it happened was in its nature but a partial, into a total loss by abandoning." (*Goss and another v. Wither*).^{*} And still more caution needs to be used in respect to a certain class of insurances which are effected against

* 2 Burr. 690.

total loss only. Here, clearly, the position is a loss or no claim at all; and there is every inducement to a dishonest shipowner to make the worst of any accident which may happen to his vessel. Even the judgment of an upright owner stands in danger of being distorted when interest leans so strongly in one direction. We should not forget the words of Justice Bayley, in *Gardiner v. Salvador* : *—“It must always be remembered that there is no such head of insurance law as *loss by sale*.” To which Serjeant Shee, after quoting these words, adds, “That which in its own nature is not a total loss, cannot be converted into one by any act of the master.”

But supposing that the circumstances of a ship really justify her sale, the question still arises, Is the underwriter always bound to pay a total loss in consequence of the ship being sold? It is reasonable to answer, Not always. Mixed causes co-operating to the destruction of a vessel have been spoken of above, in certain cases rendering it imperative that she should be disposed of at a foreign port. But though there be a genuine necessity for resorting to a port of distress; though there be real damage to the ship; a difficulty or impossibility of raising money for disbursements; though there be *bona fides* on the part of the captain; prudence and intelligence both in himself and the surveyors and tradesmen who examined the damages and estimated the necessary repairs; though there be even a correct judgment formed that the vessel was not repairable, and a valid sale of the ship,—yet, after all, the claim against underwriters may prove not to

* M. & Rob. 116.

be for a total loss, but for a partial one. For it is very possible that sea-damage, age, rot, and other causes may combine, so that, as a remedy for all, a sale will be the most judicious course that could be adopted. Such sale may probably remove difficulties; but if the greater part of those difficulties are such as by their nature appertain to the owners, and do not apply by the terms of the policy to the insurers, a sale ought not to saddle underwriters with a responsibility far heavier than that incurred by the owners. It may be, that out of the whole real and probable expenses, one fourth of them is all in which underwriters are concerned; yet, by an abandonment and sale, those parties to whom the remaining three-fourths of the damnifying causes belong seek to throw the whole onus on the underwriters, and themselves escape free.

A sale then must not always be considered conclusive. It should be sought to be discovered in what proportions the loss falls upon the assured and upon the underwriters. Tolerably exact estimates and calculations may be made from documentary evidence as to the amount of damage for which the underwriter is responsible, and a claim can be made on him for a *quasi* Particular Average, as though the ship had been really repaired; and in such a case a liberal view should be taken in calculating the possible requirements of the vessel.

Of the master's duties in general something has already been spoken: his particular duty to the insurers "is no other than the duty of an honest servant of an honest employer to those with whom that employer has contracted. Whether he proceeds to a sale or gives orders for repairs, he should carefully ascertain the

amount of damage resulting from recent perils of the sea, and of damage attributable to other and older causes; preserving for the satisfaction of all whose interests may be affected by his acts, the evidence which will enable them also to distinguish the one from the other, and thereby adjust their respective losses.”*

The tendency of Sir J. Arnould’s observations on this subject is not to the same result. After commenting on the cases of *Thompson v. Colvin*,† he does indeed say, quoting the note of Mr. Lloyd, “It is of importance to make an express distinction between the *repairs necessary in consequence of the general condition of the vessel*, and those which are required to *make good a damage covered by the policy*”—but he has previously stated, that “the better opinion in the United States, and the law as recently settled in this country, would seem to be, that, if the necessity of the repairs may fairly be referred to the perils insured against, and the ship be shown or admitted to have been seaworthy when she sailed, *the jury need not be told to exclude the expense of such repairs from their estimate*, though, but for the casualty which caused the loss, the decayed parts of the ship might have been strong enough for the voyage.”‡ And his sum-

* Abbott on Merchant Ships, &c., by Serjeant Shee.

† Ll. & Wels. 140.

‡ Arnould, L. M. M. 953, 3rd Edit. The only way of reading this sentence so as to make it consistent with the context and argument is the following:—“If the necessity of the repairs may fairly be referred to the perils insured against, and the ship be shown or admitted to have been seaworthy when she sailed, the jury need not be told to exclude the expense of *doing private repairs* (*i. e.*, repairs not necessitated by sea-perils) and which ‘decayed parts,’ but for the casualty which caused the loss, might have been strong enough for the voyage.”

mary, after adducing the case of *Phillips v. Nairne*,* is, "The rule, therefore, on the whole appears to be this: if the ship was seaworthy when she sailed, the assured may abandon and recover for a total loss, wherever by the perils insured against the ship is so damaged that she cannot be rendered *navigable again* except at a cost greater than her repaired value; *and in estimating such cost, no deduction is to be made for the incurred expense of repairs arising from her age or state of decay*: if, however, she can be repaired, *so as to keep the sea*, at a less cost than her repaired value, the assured cannot elect to abandon merely because, owing to her decayed condition, the expenses of *complete repairs* would be greater than this."†

Thus, it would seem that, as the law at present stands, underwriters are responsible not only for the results of sea-perils, but also for the chronic state of weakness and the defects inherent in the ship, which might have been concealed still longer except from some definite accident which revealed her condition, but which now conduce, with sea-perils, to the abandonment and sale of the vessel.

On Goods.

There is not much difficulty in general about losses on goods. If they are damaged to a considerable extent, and the surveyors are of opinion that it would be more advisable to sell them on the spot than to re-ship them and send them on to their destination, it is considered conclusive as to goods insured against all risks. Per-

* 4 C. B. 343.

† Arnould, p. 955.

haps, however, the position may be considered a little shaken by the decision in *Tronson v. Dent*.^{*} The main difficulty arises in respect to goods warranted in the policy "free from Particular Average." It requires strong proof that none of the goods could have arrived at their destination as goods. There can be really very few instances where this is literally the case.[†] The proof of this ought to be very convincing and clear; for if the smallest portion of a cargo could really be brought to its port of destination, it would be an arrival which would negative a claim for total loss.[‡] We must look to the true object and intention of contracts. When the policy says "free from Particular Average," or "against total loss only," the animus of that condition is that underwriters are freed from the effects of sea-water and other damages to the article insured. They protect the merchant from the absolute loss of his shipment, and they charge a lower premium accordingly; one which takes into account that they are set free from certain contingencies which policies "against all risks" are open to. We must not then allow excepted risks to steal in under changed or feigned names. Nor must we permit the most ingenious sophistry "to convert that into a total loss which was not one in its own nature." Having taken this precaution a case will now and then present itself where a cargo is truly on its way to perfect destruction, and is stopped on its way by sale, and thus

^{*} 8 Moo. P. C. C. 419, 449.

[†] *Vide Booth v. Gair*, 15 C. B. N. S. 291.

[‡] In the case, however, of *Wilkinson v. Hyde*, previously quoted, the saving of a few small packages out of a number containing various kinds of goods, was not allowed to defeat the assured's claim for a total loss; 2 C. B. N. S. 30.

some saving effected on it. A cargo of fruit after damage may, by a long detention, be in such a condition that it is quite clear that when the vessel would reach her destination the fruit would be utterly worthless and be reduced to a dangerous nuisance, so that even expenses would have to be incurred to get rid of it. Again, a corn cargo may be heating to that degree that not only is it hourly losing its value and its distinctive character, but is producing danger of the ship being burnt, or the lives of the crew being sacrificed. A cargo of ice may by delay entirely dissolve.

The case of *Meyer v. Ralli*,* previously mentioned, cannot be quoted with entire confidence, inasmuch as several questions were mixed up in it; and, as finally it appeared, the proceeds of the rye showed a surplus, though a small one, over freight and charges, and there was, on that ground alone, no constructive total loss.

On Profits and Commissions.

All real interests contingent on the arrival of a sea-going vessel are insurable. If goods shipped to my account, and assured abroad, to the extent of the invoice, are likely to realize a profit over and above the amount already covered by insurance, that expected profit is at stake, and I may insure a further sum to render myself secure from the risks of the voyage. Or, if a cargo is to be consigned to me upon which I shall realize a commission as agent or factor, I have also an interest in the arrival of that cargo, for if it do not arrive I shall lose

* Q. B. D. 9th May, 1876, M'L. C. N. S. 325.

my commission. The usual manner of insuring such interests is with a clause which expresses that they are "free from Average, and without benefit of salvage." There is, perhaps, no good reason why they should be free of Average, if it be Particular Average that is meant, because the insured profit is really only the completion of a sum which was not commensurate with the true value of the goods till this addition was made to it. And with regard to General Average, the underwriters are as much exposed to total loss on this as on any other part of the interests, and therefore they are as much concerned in any steps by which that loss is averted. However this may be, these insurances are generally understood and stipulated to be against total loss only; and it, accordingly, becomes exceedingly important to decide what is a total loss of such an interest in the constructive view. It must be repeated that the safest guide to a decision in all such matters wherein a question is raised is to ascertain what really is the position of the assured, and what was his intention in insuring. This would save much debating and much legal discussion. If we combine the intention of the person insuring with the exact words inserted in the policy, we shall probably be able to answer any question arising upon the subject with accuracy. Two things are sufficiently clear; that the general intention of such insurances is to protect the assured in case by any accident the expected merchandise does not arrive, does not come into his hands,—for then he loses what he would have gained by its arrival, viz., his profit or his commission: and we must look, therefore, very broadly and strongly on the *primâ facie* fact of non-arrival:—secondly, it is equally to be held

in mind that the underwriter is not liable for damages called Particular Average, and that he cannot pay a Salvage Loss. There can never be any salvage to him, because where goods are sold at an intermediate port the original underwriters on the goods take all the proceeds. If the goods are valued in their policy at a certain sum, the underwriters on them must not be sufferers (through an increased valuation made afterwards without their knowledge or concurrence,) by having some of the proceeds of the goods given to the subsequent underwriters. We see, then, that there can be no salvage. It is a question of arrival or non-arrival. The arrival of the smallest quantity of the commodity would be sufficient to establish the warranty, and, consequently, their position must not be injured by the will and choice of the master, agent or others, who might determine to sell the whole cargo at an intermediate port, although it contained some small proportion of sound, as being the easiest and most expeditious method of dealing with the whole concern. On the other hand, if there were a real necessity to sell the cargo short of its destination, even though the distance between the two places was only small, it would be a loss within the meaning of the policy: for the effect of that sale would be the same as if it were sold a thousand miles away,—it would deprive the assured of the profit he expected by its arrival at a particular market, or his commission on its sale by him. A vessel bringing a cargo of potatoes to London had been sunk, and the potatoes were landed at Gravesend. The distance being small, three or four days might have sufficed to get them reshipped by other craft and delivered at their destination, under usual circumstances:

but the accident happened in winter; the potatoes had been wetted, and there was danger of a severe frost coming on; and it was certified by persons conversant with the commodity that, in the state the potatoes then were, one night's severe frost would reduce their value to nothing. A sale was therefore immediately resorted to, to save what could be saved. Underwriters admitted this as a reasonable non-arrival, and paid a loss. In another case a cargo of grain intended for Ipswich got as far as Harwich, where the ship was wrecked, and most of the grain was landed at Harwich. There were circumstances that made it difficult or nearly impossible to carry it on to Ipswich, and the underwriters on profit paid a loss on their policy.

It is very important in these cases to show that through perils of the seas, &c., the merchant, agent, or consignee actually lost the profit or commission he would have had, by the non-arrival of the cargo at the place of its destination. It is equally important to exhibit the real impossibility there was of bringing the cargo to its proper place of delivery.

A case tried in the Queen's Bench is important, and seems at first sight to militate against the principles laid down. The defence in *Halhead v. Young** was in the form of a denial of interest on a policy on profits. The circumstances were as follows:—A ship going from New York to Quebec, there to load a cargo of timber and convey it to Liverpool, was lost between New York and Quebec, and the cargo, in consequence, was not shipped that season, as no other vessel could be obtained, and thus the profits were lost. All this was contained

* 6 E. & B. 312.

in the declaration. To cover the risk, a policy had been effected in the usual form, "lost or not lost, *at and from New York to Quebec, &c., and to Liverpool*: beginning the adventure (in the usual form) upon the said goods, &c., from the loading thereof aboard the ship, &c." The object and intention of the insurance had been fully explained to the underwriters by reading to them a letter from the assured; and the premium paid was higher than would have been given from Quebec to Liverpool.

Lord Campbell delivered the judgment of the Court in favour of the underwriters. He said, "The policy was *in truth on goods*, beginning the adventure from the loading thereof aboard, &c. Profit on cargo means the improved value of cargo when landed. But as no goods ever were loaded aboard the ship, the adventure never did begin, or, in other words, the loss of the ship happened before this policy attached. We consider *McSwiney v. Royal Exchange Company** expressly in point. The policy there was on profit on rice, and it was held to attach only on rice actually loaded, not on rice provided and intended to be loaded on board the ship. The construction of the policy cannot be varied by the correspondence set out between the plaintiffs and the agents. We are clearly of opinion that the construction of the policy cannot be varied by the amount of the premium."

From this judgment we observe the following circumstances. First,—that the Court could see no distinction between *profit* and *timber*. There is, however, a very great one. Profit is a *contingent* entity; and may be lost

* 14 Q. B. 634; S. C. in error, *ibid.* 646.

without the loss *in specie* of the goods from which it is to emanate: as, for instance, if the goods never reach their destination,—or are detained a whole season; because profit exists with relation to times, markets, political events, &c.; and is not a permanent and imperishable commodity. It may be compared to the scent of a flower or the aroma of fruit. The aroma may be lost by merely keeping the fruit, though the fruit may continue to exist without it—an unprofitable *caput mortuum*.

Secondly,—In adhering thus rigidly to the *printed form* “from the loading, &c.,” the *written covenant* is disregarded; viz., “*New York to Quebec, &c.*,”—which is against the rule that the written condition overrides the printed one. The judgment did not embrace the entire voyage insured.

Thirdly,—The object of the insurance was clear; and its intention was fully explained when the policy was effected and an additional premium was exacted for the additional distance and risk. The contingency intended to be insured against happened; the profit was lost;—yet after paying seven guineas per cent., the merchant finds that he is uninsured. The facts as to no other vessel being procurable, and the season being lost, &c., do not appear to have been disputed.

With regard to ignoring the extra premium, and throwing out that explanatory and defining circumstance from consideration, it is to be presumed that now the same course could no longer be taken; and that by the plea of Equitable Replication, the fact of the increased premium charged to cover an increased risk, and the representation made by the broker to the underwriter

from the merchant's letter, would be brought in as subject-matter.

Even independently of the new pleadings, this throwing overboard the fact of increased premium does not appear in accordance with former decisions. Against it may be set the following expression of Lord Ellenborough, in *Simeon v. Bazett*,*—"From the *terms of the policy*, the well-known nature of the trade, *and the enormous rate of premium*, it was clear that the underwriters meant to insure," &c. And during the course of the argument in *Halhead v. Young* it was urged, "It has been held by the Court of Exchequer, this term, that the Court may look to the surrounding facts in order to see what the parties were talking about." And Justice Crampton said, "According to recent cases the Court may also look at the subject-matter of the contract."

NOTE.—It has been unfortunate that in order to classify, or rather to reconcile, the various cases, not only some violence has been used to drag dissimilar instances under one head, but the very nomenclature itself has been strained from its original use to a non-natural sense: and clearness has been lost by thus removing landmarks. The meaning was tolerably intelligible when total losses were classed as *absolute* or as *constructive*; although, even then, the double adjective was in itself objectionable: but now, on reviewing the arguments that have been used and the judgments which have been given, the manner in which they have been employed becomes confusing. Another term connected with the subject, which has been much misused, is that of "*a congeries of planks*." It was first introduced by a very learned judge, and has since been echoed until its distinctive meaning has been dissipated. A vessel being in a hopeless state of wreck, broken, dislocated, and useless for its proper purposes, was very well called *a congeries of planks*, rather than *a ship*; for the latter term was taken to imply certain possible uses as well as a certain formal condition of the thing. But latterly, any ship injured to a considerable extent seems to be entitled to the same strong term. In the cases of *Faucus*

* 2 M. & Seb. 94.

v. *Sarsfield*,* the position taken by Mr. Wilde as to a vessel which had received a death-wound,—viz., some concealed injury to the bottom,—owing to which she afterwards sank in a calm sea, was got rid of by Lord Campbell by his saying that, a ship having such a concealed injury or wound “had ceased to be a navigable ship, and had become, in the language of Lord Tenterden, a mere congeries of timbers.”

Returning to the proposition that in this matter plain words have been perverted, or rather, that one word is made to serve for two several things, we trace the perversion gradually taking place in the following series :—

First,—*Loss*, represented the proximate but not necessarily total destruction of an object.

Total Loss,—The entire or absolute destruction or disappearance of an object.

Then the pair of opposite terms became,

Absolute Total Loss,—The entire or actual destruction or disappearance of an object.

Constructive Total Loss,—Such a proximate destruction that though the object remained *in specie* and had value, yet it was so greatly reduced in worth and use that it might be construed to be lost,—being *beneficially lost*.

Next ;—*Constructive Total Loss*,—Where, though the object remained *in specie*, and with its *uses*, yet where circumstances were adverse, where difficulties were very great, where probable expenses were excessive, and where prudence would dictate to sell at some place short of the terminus of destination.

Absolute Total Loss,—Where, though the thing remained, and *in specie*, but as a nuisance : Or, where the thing remained *in specie*, and retaining value, but with the high probability that before it could reach its destination it would be otherwise : Or, where imperishable goods were in the hands of persons out of control of the assured : Or, if by any circumstances over which the assured had not power, the goods could never, or within no assignable period, be brought to their destination. (See *Roux v. Salvador*.†)

Thus, words have grown away from their meaning.

* 6 E. & B. 192.

† 3 Bing. N. C. 266.

OF SEAWORTHINESS.

This subject has been more fully treated of in my *Manual of Insurance*; but as seaworthiness is very closely connected with Average losses, it cannot be altogether omitted in this work. I consequently introduce the section in a shortened form.

Implied in most Insurance Policies.

Although it is true that the whole system of insurance is one founded upon risks, and the supposed power of the underwriters to calculate probabilities and contingencies relating to marine adventures, it always supposes good faith to be the foundation of the contract between the two parties. Any concealment, therefore, of a fact desirable to be known by the underwriter when he accepts a risk, or any accidental knowledge which the underwriter may have gained and of which he perceives the proposer of the insurance to be ignorant, very properly invalidates and makes void the policy. But it is not only the fraudulent concealment of a fact which will thus vacate an insurance, there are certain conditions precedent taken for granted, which if they prove to be absent, though without the assured knowing it, the policy is bad. The non-payment of the premium is such a violation; but the underwriters, to prevent any danger to the assured on this score, (for the latter would seldom be certain whether his policy was good or bad, when effected by an agent or broker,) admit, on the face of the policy, that they have received the premium; and they thus do away with the power they

would otherwise have in many instances of defending themselves from a claim by the assured on account of the non-payment of the premium.* Then there is, on the side of the assured, an implied warrant that a sea-going ship is in every way fit to proceed on her intended voyage; and this fitness is called her seaworthiness. Should an accident happen to her afterwards, and it should be proved that she left her loading port in an unseaworthy state in any respect, the claims, whether on ship or goods, would not be paid by the underwriters, for the reason that the insurance was bad from the beginning,—in fact, that it never was an insurance. But there is this exception, that such warranty does not apply to ships insured for time. Few people perhaps will object to this principle as applied to the owner of the ship itself, for he, above all others, ought to have known the state of his vessel, and have seen that she was in all points seaworthy before she went out of port. But it will probably appear hard in the eyes of many that the innocently ignorant shipper of goods by a vessel which proves unseaworthy should suffer by this circumstance; and such an apparent evasion of the policy will seem an unworthy course for an underwriter to take. Undoubtedly it is very hard upon the assured; but it is equally hard for the underwriter to lose his money by the same circumstance. He insured the merchant on the supposition that he would ship his goods on a vessel sound in itself, sufficiently manned, &c. The underwriter informs himself on all

* To avoid the effect of this admission of receipt, a more modern form in many policies is, "In consideration of the sum of £— —s. —d., paid or to be paid," &c.

points in which knowledge is procurable, but he has not prescience. He cannot guess that though a ship is stated to be good she is decayed in concealed parts of her fabric. Therefore, supposing both assured and underwriter to be equally in the dark respecting such unseaworthiness, it is quite as unjust that the latter should be the loser by this unseaworthiness as the former. The merchant ships by what vessel he chooses; and he ought to be careful to select vessels belonging to respectable and careful owners. Should he be deceived, and so endamaged by the loss or injury of his goods, he has the remedy of proceeding against the shipowner for the damage which he has sustained. It must be added that the cases are rare in which underwriters dispute a claim on goods on this ground; unless there is in it a taint or imputation of fraud.

And of so much importance has the seaworthiness of ships always been esteemed, both in respect of claims which may be made against underwriters for damages, and as a protection against claims made on the ship by proprietors of goods which have received damage, that the notarial document called the Protest always commences with a declaration that the ship at the time of her sailing was "staunch, strong, and sufficiently manned and furnished for the intended voyage,"—or words to the same effect. This form has come to be considered so necessary a part of a sea-protest that some notaries and consuls keep the preamble which contains these words in print, to be used as a matter of course.

What is required for a Ship to be Seaworthy.

To be seaworthy a ship must be staunch, tight, and

strong in her hull: her mastage and rigging must be sufficient; she must be sufficiently found in stores and provisions: and she must be manned by a crew of sufficient number for her tonnage and voyage, and have a competent master to command her. If any distinct deficiency should be discovered in any particular after the ship has sailed, she would be declared to be unseaworthy. Such would be the absence of ballast in a vessel of a build which required it. In the case of *Thompson v. Gillespie*,* the ship sailed out of harbour having only a part of her crew on board and met with an accident. This was held to be a case of unseaworthiness, so that a declaration that she had sailed at all would not stand. Or if it should prove, after a vessel had gone to sea, that a seam or some butts were uncaulked, though unknown to the owner, occasioning the ship to leak and endangering the general safety, this would be unseaworthiness. How far some hidden defects in a ship at her sailing throw responsibility on the owner for all damages and charges arising on cargo is not perfectly clear, especially after the trial of *Dunbar v. Smurthwaite*,† which was very fully argued, and the verdict was given in favour of the defendant, the shipowner. And in the case of *Losh v. Brockett*,† a rotten timber in the forecastle caused the vessel to leak and eventually to founder, but the underwriters were nevertheless held liable for a total loss. In a very glaring case of unseaworthiness underwriters would resist a claim for repairs, and also for those charges for putting into port, &c., which otherwise would be of the nature

* 5 E. & B. 209.

† These were *Nisi Prius* cases.

of General Average. It must, however, be owned that unseaworthiness is generally a difficult plea to support, and it is hard to prove it with sufficient distinctness to convince a jury. Underwriters do not therefore usually dispute General Average charges arising from leaks as to the origin of which a satisfactory account cannot be given: and the decision last cited will be thought by them to have weakened their hands still more in any attempted defence they might make. There is another motive, however, which probably weighs with them in settling a General Average under such circumstances,—that of expediency. It is wise when property is in much peril, from whatever cause, to encourage any exertions made, and to justify the means taken, to save it.

The Shipowner is not bound that his Vessel will continue Seaworthy.

Though it is necessary at the beginning of a voyage, or the inception of the risk on a policy, that the ship should be seaworthy in every sense of the word, it is not imperative that she should be maintained in that condition; all that is expected is that everything will be done that is in the power of the persons in charge to restore the vessel to a seaworthy state when she has lost that condition. A storm may injure the vessel, her rigging, sails and equipments, so as to render her unseaworthy. An accident or sickness may reduce the number of the crew below what is required for a ship of her burthen: or rot may declare itself in her fabric, which did not exist at the time the risk or the voyage commenced. After any of these contingencies the ship is

really unseaworthy. If she put into port to repair damages and replace captain, crew or stores, those reparations will be made under the inspection of surveyors and, probably, Lloyd's agent. And a prudent captain will not again proceed to sea until those skilled persons have pronounced the vessel in a fit condition to do so. For should he take upon himself that risk, of sailing in an incomplete state, and should the vessel be afterwards lost, severe blame would be cast upon him, and considerable difficulties might be raised by the underwriters in settling a loss. Yet there are occasions when the conduct of a master in this respect must be looked upon with great leniency and consideration. He is often placed in a situation of much doubt and difficulty. For example: the surveyors may recommend or order that the ship shall be stripped and re-metalled. The expense and the loss of time to effect this may be enormous, and the master may resolve to go home without metal sheathing. Great regard must be had to the circumstances, to the captain's *bona fides*, and to the general prudence of his decision. The responsibility of his situation must be considered—he being, *ex officio*, agent to all the parties concerned. If the proceeding succeed, everybody will think he acted prudently, *and as they would have done themselves*. Should the result be unfortunate, every extenuating circumstance ought to be taken into consideration for his conduct.

Inception of Risk when a Ship is at Sea.

When the risk on a policy commences whilst a ship is in port in this country, both the underwriters and the

owner are able to inform themselves of the condition she is in. But in time policies the insurance may expire whilst the vessel is at sea, and, of course, proof of her state is then excluded. If the exact knowledge of a ship's condition were absolutely necessary to the inception of the underwriter's risk, this circumstance would entirely prevent a succeeding policy being effected when a ship was at sea or in a foreign port; and some other means would have to be devised for giving indemnity to the owner. To meet such a difficulty, therefore, proof of seaworthiness at the time of the commencement of the new risk must be waived, and the only information as to the ship's state will be the antecedent one of her condition when she was in port or was last heard of. Should she in the meantime, that is, after the time of sailing or when last heard of, have become unseaworthy, that circumstance will not invalidate the policy. This position differs from the former one, in which an owner is made responsible for existing defects which he was ignorant of, because there he had the power and opportunity of knowing them by sufficient research;—but here knowledge is out of his reach, and the state of unseaworthiness may have been arrived at after the point of time at which the possibility of knowledge ceased. It has been emphatically said that common law is another word for common sense; and the legislation upon this and other subjects already mentioned, comes recommended to us by its perfect accord with our notions of justice, propriety, and the necessities of the situation. The leading case at law which affirms this principle is that of *Small v. Gibson*,* tried in the Exchequer Chamber

* 16 Q. B. 156.

in November, 1850, and the appeal from that decision to the House of Lords, under the title of *Gibson v. Small*,* June, 1853. This latter is the decision which forms the key-note to Lord Chief Justice Campbell's subsequent rulings in the causes about to be mentioned, relating to the implication of seaworthiness on time-policies.†

General Exception in Case of Time Risks as to Seaworthiness.

The exception as to the necessity of a ship being seaworthy at the commencement of the risk has been greatly enlarged by some recent decisions; and, as the law at present stands, *there is no warranty of seaworthiness implied in the case of policies on ships for time*. An anomaly is certainly presented here; for very frequently the circumstances of a ship are similar, whether the policy on her be in the form of a voyage risk or a time risk: and it may be asked why the same advantage should not be accorded to the owner in the former as in the latter instance. But the late Lord Chief Justice showed the greatest determination to establish the position.

Comment on the Cases.

The decision in *Thompson v. Hopper*,‡ established that on a voyage policy there is an implied condition of seaworthiness; but that there is no such condition, overt or implied, of seaworthiness on a time risk,—although the

* 4 H. of L. 353.

† See *Dudgeon v. Pembroke*, L. R. 9 Q. B. 581, and *Pickup v. Thames Insurance Co.*, 3 Q. B. D. 594.

‡ 6 E. & B. 937.

inception of the risk and the commencement of the voyage be contemporaneous; not even when the risk commences whilst the ship is at her owner's port. The only plea that will tell in favour of the underwriter is, that an owner should *knowingly* have sent a ship, insured, by a time policy, to sea in an unworthy and unfit state, and she be lost *in consequence*,—in which case he cannot recover.

The case of *Fawcus v. Sarsfield*,* which almost immediately followed that of *Thompson v. Hopper*,† in the same court, confirmed its leading features. The ship *Lumley* was insured for time, and at the commencement of the risk she was at Liverpool, where she could have been rendered seaworthy. But she sailed thence in an unseaworthy state; and, without meeting any accident or unusual occurrence, she became leaky, and was obliged to put back to Liverpool and repair. She afterwards sailed again, and was lost. Lord Campbell pronounced the judgment of the Court.

It was not shown on the trial that the owner had guilty knowledge of his ship's unseaworthiness:—on the contrary, he was taken to have been ignorant of his vessel's unseaworthy condition, and was clear of fraud or concealment. Lord Campbell, in the judgment delivered, confirmed the previous rule that in a time policy there is no implied warranty of seaworthiness. But though exhibiting anxiety to support *Thompson v. Hopper*,‡ and the earlier case of *Gibson v. Small*,‡ in the House of Lords, he used language which leaves a sort of

* 6 E. & B. 192.

† 6 E. & B. 937.

‡ 4 H. of L. 353.

loop-hole, for he says, "We are not absolutely barred from holding in this case that there was an implied warranty of seaworthiness;" but he soon afterwards returned to his postulate, saying, "I think there is no implied warranty of seaworthiness on any time policy." He admitted that if the owner violates the *uberrima fides* which ought to prevail in making the contract, by concealing any circumstances which ought to be known, the policy would be vitiated. Still this important conclusion is arrived at, that of two parties who may suffer by the inherent defects and unfitness of a ship, it is the underwriter, on a time policy, and not the owner, who is to be the one to suffer.

Lord Campbell did not, however, carry the principle so far as to decide that the underwriters should pay for repairs to the ship when she put back into port,—the repairs being necessitated by the unseaworthy state of the ship, and not by sea perils. *The underwriters are excused from minor consequences whilst they are made liable for the greater*—the total loss of the vessel. In seeking for an explanation of this apparent inconsistency, one can be found alone in the circumstance that after a ship's loss, proof of her exact condition at the time of the event is next to impossible. With lost ships, like the destroyed cities alluded to in sacred writ, "their memorial is perished with them."

The cause of *Thompson v. Hopper* * was subsequently appealed, on the ground of misdirection of the Judge (Exch. Chamber, July, 1858), the Court gave judgment, and the majority of judges was against the appeal. It was held that unseaworthiness *per se* was no defence to

* 6 E. & B. 937.

an action on a time policy, and the previous judgment of the Queen's Bench was upheld. Some important observations were made by the Judges in giving their decision.

WILLES, J., said, "In the absence of any wrong or breach of contract on the part of the owner, unseaworthiness is no answer. In effect, there being no violation of the law, and no fraud in the assured, an increase of risk to the subject-matter of the insurance, its identity remaining, though such an increase of risk be caused by the assured, does not avoid the insurance."

In the course of the judgment the distinction is drawn between a proximate and an immediate cause ; so that a ship may be lost from a cause independent of her unseaworthiness, and the loss be recoverable. The maxim of "*Dolus circuite non purgatur*" was referred to. But the damnifying act may be apart from an intention of damnifying, and may be innocent of consequences.

Mr. Maclachlan, in editing *Arnould's Marine Insurance*, gives a curious finale to the case of *Thompson v. Hopper*. He says, in a foot-note : When it was cited as the basis of an argument in *Ionides v. Universal Marine Company*,* a very learned judge, who had taken a prominent part in the decision, interrupted the reference with the words, "It's a queer case ; pass it by : " and counsel immediately ceased to press it.—*Arnould*, 3rd Edit., 611.

This Section cannot properly be closed without reference to the cause of *Dudgeon v. Pembroke*. It is plentiful in subjects, and was contested hardly. It

* 14 C. B. N. S. 259.

† Q. B. 1874, McL. C. 323, N. S. Appeal, December, 1875 ; H. of L. March, 1877, McL. C. 393, N. S.

exhibits a striking reversal of results as it progresses from one Court to another, and a wonderful contrariety of judicial opinions. It went from the Queen's Bench Division to the Appeal Court, where it was reviewed by six judges, who reversed by majority the Court below ; it moved on to the House of Lords, where the judgment below was again reversed, and the principle was reaffirmed that on a time policy there is no implied warranty of seaworthiness, even when the period insured and the voyage then commencing begin at the same time.

PART THE FIFTH.

OF PROCEEDINGS IN CASES OF AVERAGE.

In Ship Averages.

AN intelligent shipmaster, often assisted by his mate or first officer, keeps himself informed of all the circumstances relative to the disasters which lead to the losses and disbursements which are named Averages. He enters a tolerably minute record in the ship's journal or log-book, from watch to watch, of all that transpires. On touching land his first care is to note his protest, which preliminary step must be taken within twenty-four hours from the time when such opportunity can be had. He extends his protest afterwards, at his leisure, taking care that it shall be a correct and clear statement of the events of the voyage. In both these steps he must be assisted by a Public Notary, or the Consul, or the Tribunal of Commerce, if abroad: if at a port in Great Britain little frequented, when there happens to be no notary resident or within access, he will go to the nearest Magistrate as a substitute and make a declaration. He will also make statement of the accident which has happened to the Receiver of Wreck, who forwards two reports, one to the Government Office and one to the Secretary of Lloyd's. Thus much for official acts. If the master finds that he requires advice or

assistance from others he will generally apply to the agent of Lloyd's, who, holding his appointment from the Committee of that establishment, has some authority, at least can give some assistance in cases connected with underwriters. He also carries some weight with various marine insurance offices and associations of underwriters, in virtue of the position he holds in respect to Lloyd's, or by direct appointment as agent to the other companies and associations mentioned.

An agent or a sub-agent to Lloyd's is pretty sure to be found at every port of importance or line of coast in our islands. It is not a necessity, however, that he should apply to this agent; there may be no insurance on ship or cargo rendering his interference or advice necessary. He may, rather select a general agent or some merchant to assist him in his proceedings. By the reticulation of the electric telegraph, he is able to communicate from all places in Great Britain with his owner, who, if the case seem to require his presence, can by the assistance of the railway reach the place where the ship is in a few hours. But if in a foreign country and without the possibility of asking for the advice or the presence of the owner to aid him, a shipmaster must depend greatly on himself; and even though he employ a commercial agent, which will generally be found a great convenience, he should never forget his own responsible position, or slacken in that energy and decision of action which will bring a man out of many difficulties. Energy and force of character will often be shown in his dealings with salvors and boatmen, who though a bold and useful set of men, often require to be met by a front of determination to prevent excessive demands or

unrequested interference. An active master, assisted by his agents, will seek for good and economical tradespeople in repairing the ship; he will personally superintend the work himself, and will take care that credit for old material and discount for prompt payment are duly deducted from the bills. He will also try and find the least expensive means for raising funds to meet the disbursements. Before he leaves the place he will take care to have all bills paid, and entered in a general account; and that document is sometimes certified by the Consul. Before effecting repairs, the ship should be carefully and minutely examined by surveyors, whose recommendations it is best, as a general rule, to follow.

The documents necessary to support a claim against the underwriters are the protest, the surveys, the general account of disbursements, the vouchers or receipted bills embraced by the general account, the rate of exchange, the bottomry bond, the value of ship, cargo and nett freight, the ship's policy, and any letters which may throw light on the transaction or give any information about it. Freight paid in advance must be given in a separate sum from pending freight.

In Averages on Goods.

When goods are found to be damaged in an intermediate port, they are to be carefully examined by competent persons, who will recommend the proper steps to be taken for drying or reconditioning them; or, if there is danger of their perishing or of injuring other parts of the cargo by their re-shipment, then they will advise the sale of such portions as will avoid this inconvenience.

When there is an agent for Lloyd's, he will in general be called in to assist and advise; he will attend the survey and the sale, and certify to the correctness of the papers, and see that due care is used in all parts of the transaction.

If the damage be discovered at the end of the voyage, at the port of destination, it is still best to procure the co-operation of Lloyd's agent whenever there is one resident. He will appoint respectable trade surveyors, and will see that a proper investigation is made, that a correct certificate of sound value on the day of sale is given, and he will be careful that the papers are in all respects complete;—that they state whether the sound and damaged prices are in bond or duty-paid; whether for cash or for credit; and if the latter, he will annex the usance of credit and the rate of discount. He will be careful to comply with very strict directions which have been issued, and enforced by subsequent second circulars, from the Committee of Lloyd's, to cause a careful selection to be made in case of piece-goods, separating the sound pieces, and allowing only the damaged ones to be sold. He will sometimes interpose, where public sale charges are very high and the damage slight, and will prevent the loss and expenses of a sale at auction by effecting a compromise with the merchants, making them an allowance for the actual damage, founded on an estimate by a broker or other skilled person. Lloyd's agent will also examine the log-book, and forward a copy of the master's protest to Lloyd's, or, in some cases, to the merchants whose goods have been damaged: and he will also, whenever practicable, procure the master's attendance at the survey, and get his

certificate to the truth of the statement that the goods were really landed in a damaged state from his vessel. A very material and useful document is the actual account sales of the sound portion of the goods. It is nearly always preferable to a certificate of sound value, and it gives important information also as to the conditions of sale, allowing a comparison to be made of the period of credit, difference in charges, the saving of ordinary merchants' commission in consequence of goods being sold at auction, &c. Lloyd's agent will also state the rate of exchange on England prevailing at the time the transaction took place.

Thus the proper documents will consist of—

The protest, or an extract from it.

A survey by merchants or other skilled persons, and attested by Lloyd's agent.

A survey on the ship's hatches.

An account sale of the sound (similar) goods on the day of sale of the damage ; or

A certificate of sound value ; specifying length of credit and rate of discount.

Statement of duties.

The rate of exchange.

The policy.

The invoice.

The above would be a complete set of papers ; but some of them are frequently dispensed with, as when the damage is small it is unwise to increase it greatly by heavy expenses for documentation.

When the damage is on goods arrived from abroad in this country, the papers required are—

The protest, or the log-book.

The dock landing account, with survey on damage attached, as provided by the Act of Parliament.

Sales of the whole parcel of goods, sound and damaged.

Broker's certificate of sound value, when necessary.

Account of any extra charges.

Policy.

Invoice.

In case of Produce, it is sometimes useful to have the deliveries of sound packages of the same article, to establish an average sound rendiment.

OF FRAUDULENT CLAIMS.

This is an ungrateful part of the subject, yet a volume like the present would not be complete were the frauds which are, unhappily, frequently practised or attempted passed over in silence. There is no system or institution, however useful and good, which is not taken advantage of by dishonest and designing people to procure their own ends, and, by whatever means to gain money. The system of insurance, though so advantageous generally to the spread and safety of commerce, happens to be peculiarly open to fraudulent attempts—from a slight concealment of a fact to deep-laid and well-concerted frauds, which may be termed documentary burglaries. In life assurance the frequency of fraud is certain; and disclosures, from time to time have brought to light such extensive malpractices, that

a belief in the beneficent effects of life insurance is sometimes rudely shaken, from seeing that this system often encourages the bad tendencies of men, and offers a rather easy means to dishonesty. The managers of fire insurance companies inform us, also, of their conviction that a proportion of claims on them, incredibly great, is composed of fictitious cases, and arson. It is certain that marine insurance cannot claim exemption from similar depredation. The effect of fraud is in every way disastrous. It disconcerts the calculations of underwriters as to the premiums for risks; and it creates a general suspicion in reference to claims, although by far the greater number must still be considered genuine ones. Difficulty in making settlements causes anger on the part of the assured; and thence there springs up an antagonistic and litigious spirit between the insurer and the insured, injurious to both classes, and anxiously to be deprecated by either side. Anger and law-suits are not sufficient to stop this deteriorating state of things. Spasmodic efforts to remedy some particular wrong are a poor substitute for that general uprightness which should be everywhere inculcated and cherished in mercantile transactions.

Various Forms of Fraud.

That class of frauds which consists of concealment or misrepresentation of facts at the time of effecting a policy applies to the subject of Insurance, and not to Average. It need not, therefore, be entered upon here. The reader may be referred to the judge's remarks in the cases of *Morrison v. Muspratt*, and *Lindenau v. Desborough*,*

* Park, by Hildyard, 937 et inf.

on a life policy, because the law of concealment is there stated broadly and distinctly.*

The frauds to be mentioned relate to the claims on policies in existence. In insurances on ships they consist of owners getting underwriters to pay for repairs not arising from perils insured against; making them pay for old defects or decay discovered when the vessel is opened to effect the repairs of recent damage; making them pay for improvements, and even in some cases for lengthening the vessel. If the bills are purposely made out to conceal the owner's proper repairs amongst those appertaining to underwriters, it often requires all the skill and acumen of the Adjuster, assisted by a practical Surveyor, to unravel the items; and, no doubt, after every effort has been used to investigate them, if the accounts are speciously framed, underwriters suffer by them. Again, when the metal sheathing has been on the ship so long that it needs renewing, an owner may prevail

* The late Judge Haliburton gives an amusing illustration of sharp practice on both sides, in the case of an insurance broker and his client in New England. Both were Quakers. The client having misgivings which amounted to more than a doubt respecting a ship of his, wrote to the agent desiring him to insure, and telling him the partial truth that another vessel which had sailed after his own had already arrived, which caused him uneasiness. The broker, fancying he could read his friend's mind, wrote back that the ship was thought badly of, and that the insurance could only be effected at a high rate, which he named, and that he would complete the insurance if he did not hear again. His client, in reply, said, "Thee need not insure now, as I have received tidings of my vessel." This was too good an opportunity for the other to let pass. He therefore took the risk himself and returned answer, "Thy letter came too late; I have closed this insurance at the rate named." This was exactly what the shipowner wanted, and he wrote back, "It is well that it is done, since it is done, and the policy will stand: but I am sorry to inform thee that the tidings I heard of my ship were, that she was lost."

on the surveyor to state that to repair the damages it is requisite to strip the ship and re-metal her. In fact, if the surveyor be not a man of integrity he can greatly assist in defrauding underwriters.

False accounts are another plan of fraud. False quantities and prices; bills simulated altogether,—such materials and labour never having been employed about the ship. A case came to light where by a minute inspection of the water-marks in the paper and some other circumstances, it was discovered that the supposititious bills of a dozen tradesmen had all been manufactured by one penman. The Committee of Lloyd's, some time ago, took the severe but effective remedy in their hands of publishing the names and facts of some gross cases of fraud of this kind in the "List." A more common means is for a tradesman to make out two bills for the same work done; one real, for the owner to pay; the other expanded, and significantly stated to be "for the underwriters." Again, stores are sometimes charged as having been sent on board which have really never been supplied. The concealment of discounts or allowances is frequently made; but this hardly amounts to fraud, as in many instances the length of time between the repairs being commenced, and the claim being paid by the underwriters, may have removed any right the latter would have had to the discount if the claim had been paid immediately. Nevertheless, the concealment of the circumstance is improper. Every transaction should be clear and above-board, and the bearing of the special circumstances of the case should be left to the decision of the person entrusted to state the Average.

A most improper proceeding is known to be not

infrequent in outports and places abroad—that of giving presents to the master to get him to agree to and pass exorbitant charges. It is said that salvors often present the captain with a share of their gain, that he on his part may not resist their heavy claims and may afterwards give a coloured version of the accident and its consequences.

When any of these practices are discovered, it excites in the underwriters and others who were intended to be defrauded by them a just and natural indignation: and, as discrimination is very difficult, it creates suspicion in cases where no ground exists for it; and so by the unscrupulous selfishness of one man an injury is done to a number of innocent persons. This is the way with crime generally. Independently of everything else that can be said against it, it is very bad economy:—it wastes a great deal to secure a little.

On Goods.

Frauds in respect to goods' policies are as common as those relating to ships, and are still more difficult to discover. A lax code of commercial ethics, fluctuations of markets, changing customs, &c., perplex the names of right and wrong, and prevent a direct appeal to conscience. An underwriter may entertain the strongest presumption of wrong-dealing, and yet have no power to lay his finger on the very fraud itself. Nevertheless, if it is found that claims *constantly* arise in one particular port, and that at another port, similarly situated, claims are rarely preferred; or if it be experienced that claims at A. are always heavy, while claims at B. are generally

light when they come, a violent suspicion is naturally awakened that claims are made at the former of the two ports when sea-damage does not really exist; or, that when a small quantity of damage has been sustained it is made the most of, and is magnified into a heavy claim on the underwriters.

It has been commonly noticed, moreover, that claims on goods abound when trade is bad and markets are low. Two specific and valid causes of this have been mentioned in a previous part of this work; one, the greater disparity there will always be between the prices of sound and damaged goods in times when commerce is depressed, or, as it is sometimes said, "when the market is sick;" the other, the greater care which merchants take to recover from the underwriters in every case where there is the slightest ground, under the conviction that it is very necessary at such times to look after the pence as well as the shillings.

A source of claims on underwriters is the mistake or the purposed want of observation of the surveyor as to the nature of the damage on goods; the setting-down as sea-water damage what was country-damaged, or has arisen from the condition in which the goods were shipped.

Another cause of an undue increase of the claim is the non-selection of the damaged portion of a package from the sound. It has been already stated that very particular directions were issued by the Committee to the Lloyd's agents to have this separation made in every practicable instance; but it has been also explained that there are cases when this division cannot be made with justice to the assured,—as in the

instance of an assortment, and some other particular circumstances.

A grave cause of increased claim, and one very difficult to detect, is the untruthfulness of some certificates of sound value. Sometimes the "price-to-arrive" is given as the sound value in a falling market; and the comparison is made between this and the actual sale at a later period. Sometimes a quite imaginary value is put upon the goods,—one that they would never realise. This is believed to be the case in some of those places where the certificate of sound price is given in the form of an advance on the invoice cost; and the advance is frequently stated to be 75 or 100 per cent. on cost price,—although we know that at the date of such certificate the market happened to be overstocked with that kind of merchandise.

Remedies.

It is useless to enumerate farther. It is of more consequence to inquire whether there are any means of stopping frauds, or of securing underwriters against them. One of the most obvious is to appoint vigilant agents, and to make it a *sine quâ non* that they shall be called upon to attend the survey and all proceedings about Average cases, so that they may be able to certify to the correctness and the good faith of the transactions. Another means is to take the trouble of sifting out any suspicious case, and to get every document that bears upon it and examine it by the light of collateral evidence. Another remedy is to cease to insure to such places and such persons as are proved by the underwriter's ex-

perience to bring constant and numerous claims. It has even been tried to offer a premium on the sound delivery of goods by returning part of the premium charged in case there is no claim for average. And, lastly, there is the grand means of individuals enforcing, by their own practice and influence, a general strictness and exactitude in all matters of this nature, so as to make every certificate and every claim a subject of conscience. If it be still found, notwithstanding all precautions, that premiums are inadequate on account of the excess in number and amount of claims, there is no alternative except to increase the premium, or to underwrite the risk "free of Particular Average."

PART THE SIXTH.



OF MUTUAL ASSURANCE ASSOCIATIONS OR CLUBS.

THE principle of reciprocity, which has become so very general in Life Assurance, has of late years been largely acted on in Marine Insurance. The Mutual system has also been extended to the protection of freight and outfits. Numerous associations or clubs have been established in London and elsewhere; but nowhere has the method taken such root as in the ports of the North-East Coast of Britain.

A detailed account of the Mutual system will be found in my *Manual of Marine Insurance*, to which subject the constitution of such insurance societies properly belongs. Enough only will be here repeated or said of their form and nature to introduce in an intelligible manner the matter in which a work on Average is concerned, namely, the claims of members on the Club or Association.

The principle is in itself very simple; it is indeed that of a benefit society. The members form a partnership *ad hoc*, but for no other purpose than for the insurance or protection of their ships. They contract themselves out of the common law, and bind themselves by a set of self-made rules.

The appeal to Courts of law is only to give effect to the

rules established by the members themselves. It is difficult to say how far the action of such a system comes under the Sea Policy Stamp-duties Act; or how far an infringement or evasion of the Act is permitted or passed over.

One of its main objects is to effect among shipowners a saving of that surplus of premium over the actual risk which is the professional underwriter's profit. Instead of the *association*, or *club*—which words are adhered to when speaking of mutual insurance clubs to distinguish their action from that of proprietary companies—proceeding on any calculated tables adjusting premiums to risk, which are always practically either in excess or defect of the result of any one year,—they feel their way along, as it were, by making call after call for the actual losses that have occurred; and thus each year becomes an experiment; and whether it be a good year or a bad one, only the equivalent to the risk run is paid by the assured.

This empiric system has an advantage in economy. First, the members only pay for insurance the actual price of the contingencies of one year, loaded with management expenses; and secondly, they pay that equivalent in instalments, instead of disbursing the whole premium for a year or a voyage, as is necessary in ordinary insurances. Thus there is a saving of interest on the call system. It is not intended to assert, however, that the aggregate of calls for a given time is less in amount than a definite premium, as the liabilities of clubs differ, and are usually greater than those taken by ordinary insurers: and there are also other circumstances which affect the question.

Though this is the outline of the system, some adjust-

ment is required to make it work in practice. There must be a parity among the members. As to amount, that is easily settled:—the amount for which the club is liable in respect of the ship of any particular member, is the sum on which that member is to contribute towards the losses of others. But amount alone will not produce parity. If ships of high and low class are associated together without regard to quality, the owners of the high-class vessels will soon find that theirs is a union in which the advantages are possessed by the owners of the opposite class of ships. The result will be that the superior vessel will be always the loser by its association with inferior shipping. The former class will from its superiority bring in a comparatively small quantum of risk, and will, from the greater intrinsic value of the ships, pay a high proportion of the losses.

Some arrangement must therefore be made to prevent this double disadvantage. In some associations, called A 1 Clubs, only vessels of that registered class are admitted, and they are thus pretty nearly on a footing. In other clubs the vessels are gathered into separate classes:—there are associations which carry such division into as many as six classes. Again, in some associations an imaginary value for contribution is placed on the ships, apart from the value claimable in case of the ship's loss. In a fourth set of clubs the disproportion is rectified by the introduction of premiums, of which there are classes suitable to the classes of vessels. And a fifth plan was partially in use in Sailing Wooden Ship Associations of encouraging the entry of vessels of high class by working the rule of differential values inversely, and thereby increasing the amount of claim (for Particular Average

only) in proportion to the excess of the declared value over the nominal value ; so long as the addition did not give back to the insured member more than the third deducted from repairs. As far as the writer knows this plan has been entirely abandoned : and the difference between declared and nominal valuations is only allowed to act in the reduction of Particular Average claims, as a deterrent to low declared values, and indeed as a compensating arrangement for the protection of the more highly valued vessels in the club.

Two examples will make this plain.

Let us, for simplicity, suppose that the whole declared value might be and was, insured in such a club.

Ship's tonnage 200 tons ; nominal or club value, at £9 per ton, £1,800. Claim for repairs after thirding, £180. Declared value, £6 per ton, £1,200. Rectification of the claim ; if £1,800, pay £180 ; £1,200 pays in proportion, £120 ; leaving £60 at the debit of the owner.

Then, reversing the formula, according to a plan once acted on :—

Declared value at £9	.	.	.	£1800
Nominal value at £6	.	.	.	1200
Suppose repairs	.	.	.	£270
Less one-third	.	.	.	90
				<hr/>
				£180

If £1,200, pay £180 ; £1,800 will pay £270 ; *i.e.*, the whole repairs in full.

But had the disparity been still greater, and the declared value been £2,000, and the augmented claim for Average have been £300, the club would have confined itself to a payment of £270, otherwise they would be overpaying the actual outlay.

It will be observed that the plan described above for equalizing onus and inviting high values has but a partial effect, because it acts only in case of damages,—and those confined to the hull of the ship—and has no corrective action on still more important claims, those for total loss.

As we have said, the scheme for enhancing claims on high-valued ships is now almost, if not entirely, given up; and the action of a comparison between declared value and nominal value is confined to reducing claims on low-valued vessels.

Constitution of Clubs.

The true ideal of a mutual insurance club requires that it be formed in a locality where there is a comparatively limited community, and where the members of the shipowning class are well known to one another; this implies, what usually follows, that their ships and concerns are also matters of mutual knowledge. These persons combine together, upon the principle of a benefit society for reciprocal insurance. No profit is expected to be set aside, no capital is required; it is a temporary union, generally for one year, during which period the members guarantee one another, or in other words, divide among the whole the individual loss of a "suffering member." The management consists of a committee of some five or more intelligent members of the club; and there is a secretary or manager, usually also one of their own number. The expenses consist of his salary, which is generally proportionate to the extent of the association,—an allowance of four shillings per cent. on

the entire value of shipping entered in the club, is a common rate of payment; and of such charges as printing, stamps of policies, &c.* Indeed the simplicity of the constitution and working of a club is one of its great merits. At the beginning of the year or term, a small subscription is usually made for current expenses.

The labour, and whatever there is of intricacy, in keeping the accounts of a club arise principally from the constant change, from day to day, of the capital on which contribution is made towards losses and averages. Fresh tonnage coming into the club, ships being withdrawn, and vessels being lost are constantly varying the total of the contributing capital.

At stated times, but commonly once in each year, there is a general meeting, to make, amend, or abrogate rules. These rules are the bye-laws of the society: they are optional, and can be altered from year to year. The policy in use at Lloyd's is frequently taken as the basis of the mutual agreement, *mutatis mutandis*, so as to adapt itself to the form of the association. The policy is also used in order to comply with the regulations of the Stamp Act. To this policy is affixed a printed copy of the rules. Otherwise the rules are contained in a separate book or sheet: but in either case they are declared on the face of the policy to form an integral part of it. The manager or secretary signs the policies, on behalf of the whole of the members, under a power of attorney given by them.

* Some clubs are worked by a salaried secretary.

Club Rules.

The Rules of each association form a most important part of the subject ; for by the provisions enacted at a general meeting an indemnity more or less complete can be secured for the members. Thus, if it be desired to provide an indemnity more full than that granted by the Lloyd's policy, it can be done ; of course at a greater expense in the way of subscriptions, termed calls or drawings. If, on the other hand, a slighter insurance be considered advisable, restrictions of any sort can be introduced, and then suffering members recover less ; but the expense of the drawings, which take the place of premiums in ordinary insurances, will be proportionably less also. Thus, the wishes and the convenience of the members of the club will determine whether at a large general expense any member suffering loss shall receive a full indemnity ; or whether a smaller indemnity shall be granted to suffering members, but at a less rate of calls or premium. Accordingly, one club will have repairs paid without deduction or melioration ; others will allow for the wages and keep of the crew during the time a ship deviates, or is under Average ; another allows for cables parted and anchors lost ; one excludes caulking and some other specified repairs. In many, variable deductions according to age are made from materials and labour ; and particular voyages, seasons, and goods are excepted ; or it is agreed that specified deductions shall be made from claims on ships when they have been engaged in particular voyages, or during particular seasons, or whilst carrying hazardous cargoes.

The rules of the club are to be rigorously interpreted

and strictly adhered to. There are bye-laws made by the community of the club, and the members bind themselves to abide thereby. In some few cases the managing committee have power to relax a rule. In *Turnbull v. Woolfe*,* by a rule of a mutual association, a member of it who mortgaged his ship, was bound to give notice of the fact to the committee, and the mortgagee was to give a written undertaking, on a printed form prepared by the club, to pay all calls in respect of the mortgaged ship when demanded of him. The insured member failed to give such notice, and the mortgagee did not give the undertaking. The member continued to pay all calls himself as they became due, and the ship was lost. The club refused to pay the loss, on the ground of the failure of the required notice and infraction of the rule. Vice-Chancellor Stuart, before whom the case was heard, ruled that the club must pay the loss: that such a rule was dangerous, and to make it binding on a member he must have had notice of it; and that a constructive notice was not sufficient. The cause was reheard before the Lord Chancellor (8th November, 1863),† who reversed the Vice-Chancellor's decision, and upheld the rule as a necessary condition-precedent to a claim being made.

And more lately a case has been tried on a club policy, in which there was a condition that the calls or drawings on the members should not exceed twenty per cent. in each year. The plaintiff presented a claim on the clubs, which was rejected, for the reason that the claims or drawings already amounted to twenty per cent. The contention was, Which ought to be upheld

* 3 Giff. 91.

† 11 W. R. 55.

—a known, printed rule of the association; or the valid claim of a suffering member who had paid his calls, and became ousted of his claim by the action of such rule?

In fact, safety ceases as soon as either party to a written contract begins, from whatever motive, to depart from the agreed terms. The results in some cases seem very hard; as in *Xenos v. Fox*,* where the owners of the *Smyrna* steamer, without “the previous consent of the underwriters, given in writing,” defended an action against the steamer, in which the damages were laid at 20,000*l.*, and succeeded; and the underwriters refused to contribute to the incidental costs and expenses thrown on the assured in thus successfully defending themselves. The dictum of Chief Justice Earle in *Aubert v. Gray*,† is memorable: “The governing principle for the construction of contracts, is to give effect to the intention of the parties expressed in the words of their contract.”

Cargo, Freight, and Outfit Clubs.

The associations so described are chiefly for insuring the bodies, stores, &c., of ships. There is another class called Cargo and Freight Clubs. These are intended for the owner's protection when he is carrying coals and other cargo on his own account, and in respect of his freight when carrying other persons' goods. The object of the Freight Club is to insure the owner at all times when his ship is at sea, whether she be loaded or in ballast. Their policies contain two scales of payment

* L. R. 3 C. P. 630; 4 C. P. 665.

† 3 B. & S. 163.

in case of loss : one for ships loaded, the other for ships in ballast. The scale is generally a fixed allowance, in both cases, of so much per ton or keel, and often with distinctions for different voyages. They are sometimes called Freight and Outfit Clubs. When a loaded ship meets with an accident occasioning contribution, the freight-club policy pays its quota of the General Average.

It is a question yet to be considered, whether, as a freight club has an amount always at risk, be the vessel loaded or empty, that amount ought not to contribute, where there has been General Average, towards the costs or sacrifices by which the ship is saved, and thereby the freight or outfit.

Advantage of Locality.

Though most of the local clubs begin, and some afterwards continue, to insure the ships owned in the immediate neighbourhood where the club is established, many of them do not reject the admission of vessels belonging to other ports at any distance from home.

But the great advantage of a limited and strictly local club is, that when a disaster to a ship occurs, it is superintended and watched by members of the association, some of whom are practical men able to survey damages, direct repairs, and go the cheapest way to work in the matter of expenses. An appreciable part of all the money spent in repairs and expenses of ships under Average is wasted by extravagance or lost by bungling.

Method of Paying the Losses.

There are no such things as Premiums in the club-system.* Premiums of insurance are sums paid in advance, being the calculated equivalent of the risk undertaken, and including a profit to the underwriter. In the mutual principle nothing is paid for profit. Clubs are truly *benefit societies* on a large scale, their object being to guarantee members mutually from a particular class of loss. In some clubs a small fund is subscribed at the beginning of the year for the convenience of making prompt payments ; but the general plan is to hold periodical meetings of the committee, when all claims sent in are examined and discussed, and those which are found to be in order are collected in one sum, and a call is made on the whole capital of the club, called a “drawing.”

Hazardous Cargoes and Voyages.

Many of these associations are formed for the purpose of insuring small vessels carrying, usually, heavy cargoes or goods of very small value. Such cargoes throw an extra risk upon the association, both from their nature, and from the small value they possess on which to contribute when there is a General Average. A compensation is therefore made by vessels carrying such cargoes

* Some clubs do, indeed, introduce the word in their policies, and confess its payment, as if to conform to the Lloyd's policy which they use. Some even have of late printed in the body of their policy a stated but imaginary sum for premium—as, for example, “twenty per cent.” This seems a deviation or departure from the true club principle.

in the form of a deduction from the amount of claim, when one arises ; and according to the locality of the clubs, various articles are excluded from the rules of one which are not mentioned in those of another.

Strict limitations are also made in respect both to the times of sailing and the voyages and ports to which the vessel is bound. The clubs generally concur in the broader distinctions of season, and of the times when increased danger belongs to voyages to the North Sea, Canada, &c. ; but most of the clubs have also their local dangers which they desire to avoid,—hazardous ports, tidal harbours, rivers, &c., which are practically known to be dangerous at certain seasons or at all times of the year. In some of the policy-rules these limitations are exceedingly stringent and minute. These limitations are enforced by deductions from claims, when they occur, in respect of the excepted season or place, or by an extra premium charged.

The constant touching of steamers on the sides and bottom of the Suez Canal, in the shallow water in the mouths of the Danube, and on the elongated sands near Kertch, commonly called Yenikale Bar, led the clubs to refuse to admit such groundings as “strandings” so as to defeat their warranted limitations respecting Particular Average, even in cases where groundings would be, in other situations, construed into strandings as defined by law. Sometimes the prohibitory clause in policies uses both terms, viz., “strandings” and “groundings.” No stress should be laid on the two words as setting up a distinction in nature ; the variations in terms appears to be made in order to avoid tautology.

By a pretty general concurrence, the 20th of Febru-

ary is the usual date of commencing annual insurances in clubs, but not invariably.

Adjustment of Claims.

The constitution and rules of mutual insurance associations give to the committee of management a general power to decide on claims for losses and damages made by members; and in some an appeal is allowed to a general meeting of the members. In certain clubs the duty of preparing the statement of claim to be laid before the committee devolves on the manager, secretary, or (as called in Scotland) the agent, who is generally selected for his intelligence and fitness for the office. There is usually a stipulation, that claims for Average shall be made in conformity to the custom of Lloyd's, having regard to the rules of the club; and some associations also refer to their usages, which are sometimes written and form an appendix to the rules—in which case they would more appropriately constitute part of the rules themselves; and sometimes they are oral and traditional—in which case they have the danger and fault of all concealed and unwritten provisos. In many clubs it is a rule that all claims shall be made up by a professional Average-stater; in others that the claims must be stated by a Lloyd's Average-adjuster, or a member of the Average-Adjusters' Association. In all, however, the claim is to be made and settled with reference to the special rules, warranties and conditions annexed to the common form of policy, and which added matter is declared to make part of the policy itself. The suffering member generally has leave to choose his own adjuster. The committee, if dissentient to the claim as adjusted,

can have it readjusted. Or the committee first adjust the claim, and the suffering member, if dissatisfied, may have it readjusted (generally stipulated to be at his own expense) by another Average-stater, and then, if a disagreement exists and the difference cannot be arranged, the Arbitration-clause is resorted to; the most usual course of which is, either that the claim shall be referred to one person, or that club and claimant shall each select an arbitrator, who are either empowered or compelled to choose a third arbitrator or an umpire, and the decision thus arrived at is to be final. In most clubs legal proceedings by the suffering member are barred by the Arbitration-clause; for a reference to arbitrators is to be an act precedent to any action at law, and a subsequent action when thus maintainable is only to enforce the award made.

The Average Clause.

As might be expected, no uniform limit or minimum exists among clubs in respect of repairs. Each society determines for itself what the limit shall be. In some it is, as in the Lloyd's policy, a rate per centum; in others it is a rate per ton or per keel. In one association the minimum is placed as high as 15s. per ton, in another as low as 2s. the ton. In some clubs the repairs and contribution to General Average are allowed to be added together to reach the necessary limit; in others, the aggregate damage received and damage done determines the question. Some clubs make no exception in their rules in favour of stranding. Most allow wages and provisions for the crew during a vessel's detention under Average. The generality of clubs have intro-

duced a wholesome rule as to sheathing and caulking, in allowing nothing towards those expenses unless metal sheathing has been renewed and the bottom been caulked within specified periods. In every claim made on a club the Adjuster requires to look carefully at the rules of such association.

Deductions for Melioration.

In the deductions made on the score of melioration by repairs, the views of various mutual associations embodied in their rules exhibit very great diversity. Clubs for wooden vessels, now few and small, necessarily make different provisions in respect of "new for old" from corresponding rules in clubs for iron-built sailing vessels; and the growing application of steam requires for ships propelled by its agency other arrangements. All are, however, directed towards the object of not putting an owner into a better position when he has to repair damages by sea-perils than he was in previous to the accidents which rendered repairs necessary; in other words, all such rules are intended to prevent the insured shipowner gaining by the misfortune which has befallen his vessel. All these deductions and exclusions are specified in the club rules; and to attempt to give anything like a complete account of them would be the unnecessary task of collecting and classifying a hundred different sets of rules. Moreover, the members of each club, assembled at a general annual meeting, are yearly in the habit of making some alterations in their rules as they think necessary and advisable; and a new book of rules is, in most cases, produced every time the 26th of February comes round.

More important than the mere question of deductions seems the usage of clubs as to the limit of time or voyage in constituting the unit on which the warranty of the repairs is to be tested, whether it be one or three per cent. or other proportion. Indeed this question applies equally to all other insurances. Nearly all (in the absence of any legal decision) take a voyage to be such an unit, however long and circuitous that voyage may be from its commencement to its termination, provided there be no returning or doubling in its circular course. But some clubs introduce the condition that "two passages" constitute "a voyage," and they define a passage to be the ship's journey from one port to another. In this sense, the going from A. to B., and then from B. to C. is a voyage; but in Lloyd's and other policies the rest of the alphabet might be introduced, so long as the circuit of a voyage, even though it occupied more than twelve months, was always onwards with no retrogressions or intermediate voyages. Till a case has come before a Court and been authoritatively decided, we can only speculate what the law would hold as the unit by which an insurance is to be tested. Possibly it may be that on an insurance for a year, twelve months may be adopted as that unit; and all the damages occurring during that period may be aggregated, to arrive at the required limit in the warranty.

Anchors, Chains, &c., how paid for.

The manner in which anchors, chains, &c., are dealt with in clubs is very various. In some the association pays for their loss whether they be slipped, cut or broken;

and the deductions for melioration are various; the anchor being generally allowed without deduction, and the chains subject to a reduction of a third, and in some the deduction is dependent on the age of the chains. Most clubs require that the chains, &c., be tested, and have the ship's name branded on them.

The instances given of the different usages and modes of treating claims must be regarded merely as specimens of variety in the formation of clubs and their rules; and as the rules of a club are usually reviewed by the members at a general meeting at intervals, it frequently happens that a rule is expunged or varied, or new rules introduced; and so some of the examples above stated may be already obsolete or abandoned, and replaced by more modern views.

Manner of paying Losses.

The method by which the general body of the assured, or members of a club, provide and pay for the loss or damage sustained by a suffering member, need not detain us here, because the arrangements for this purpose are subsequent to the subject of the present volume—Average. The usual course is, however, to hold periodical meetings, at which claims are decided on, and those properly falling on the association are massed into one sum and divided over the whole capital. A call is then made by letter on all the members by the manager or secretary, and if a payment in respect of an Average or loss is due to any member the call is a set-off, *pro tanto*, against it. The calls are generally in the form of bills of a certain date; and if a member do not pay his ac-

ceptance, his vessel, very properly, ceases to be insured by the club. In some clubs the payment to suffering members is made in the members' bills. I think this is, for several reasons, objectionable.

DEVELOPMENT OF THE SYSTEM.

It remains only to observe not so much on the growth of Mutual Insurance Associations, as on the evolution which has marked the system. Clubs for the defence and protection of the shipowner have come into existence offering him security in every direction. The panoply of Achilles had one vulnerable point, but the English shipowner can clothe himself with an armour more complete,—if he will pay for it. He may enter

A Protection Club, which will give him back the fourth deducted in collision cases; the loss or damage to cargo on board his vessel caused by improper navigation; loss of life or personal injury; damage to piers, jetties, &c.; cost of removing sunken wreck;

A Thirds' Club, which will return him that proportion deducted from Average repairs for melioration;

A Small Damage Club, which undertakes to indemnify the owner against Average falling below the limit fixed for claims in ordinary policies;

An Indemnity Club, which covers the owner (in certain cases) for the excess of the liability of other insurances;

Beside and beyond these are to be mentioned

A Premium of Insurance Club;

A Detention Club; Demurrage Club, &c.

It can scarcely be said that the mutual principle has yet been applied to insurance of merchandise; nevertheless there are existing companies which, by arrangement, are working in that direction by making returns of premium to their regular customers, they being also their shareholders.

PART THE SEVENTH.



OF ARBITRATION.

It has been seen that the Policy is the instrument which represents the contract between the insurer and the assured. In its language it is obsolete, in its scope it is contracted; it is too long to be simple, and too short to be explicit. In its continued use some expressions are conventionally allowed to be daily contradicted, whilst on the other hand a question of law may be raised on almost every word it contains. Its small base is the foundation of a thousand legal decisions; and each new judgment delivered leaves open a fresh question. Like a piece of old china, it is venerable from the number of its mended fractures.

Modern insurance companies, in adopting the text of the Lloyd's, or common form of policy, for the basis of their particular contract, have made various alterations and additions in it. They strike out its pious expressions, and insert the "running down" and other clauses. The Clubs or Insurance Associations have gone farther in deviations; and although the old marine Policy generally forms part of their contract, it appears to be retained mainly on account of stamp-duty. The rules which are attached to, or accompany, the policy express the precise scope of the mutual indemnity intended.

The claims of assured persons on their underwriters are of the most varied description. Each claim is reduced to writing, and the document which sets it forth is called the Statement or the Adjustment. Formerly, before commerce had expanded into its present proportions, the assured used to make up his own claim, or get some more experienced neighbour to do it for him. Afterwards, certain persons doing business at Lloyd's became esteemed for their knowledge and experience in such matters, and to them were entrusted many of the claims to adjust and get settled. Until about sixty years ago the business of making up adjustments was combined with that of an insurance broker: but from that period there was sufficient business to establish Average Adjusting as a separate profession. There is a great objection to having statements made up by an insurance broker, as there would be in having them arranged by an underwriter, because they would in either case be *ex parte*, and could not fail to be often tinged in some degree with the pardonable and natural views which persons take who see the same object from different positions.

The persons who devote themselves to this profession are called Average-Adjusters, or Average-Staters. In the majority of cases they decide the questions which emerge, and they make the numerous calculations which are involved in claims. The position of the Average-Stater is not official or authoritative; and both underwriter and assured are at liberty to dissent from his decisions, and raise questions on each separate case. The respective rights of two parties bound by a contract so susceptible of misunderstanding as that of the policy

of insurance are necessarily often ill-defined, and become the grounds of serious discussion ; and in matters relating to marine insurance there is frequently the collision of law and custom. Then there is the consideration of foreign codes and usage ; for although English underwriters are in strictness bound only by the laws of our own country, yet our system may be said to make nutations to foreign practice, which is too large and important to be ignored.

Some remedy is therefore required for the settlement of disputed claims independently of the ultimate appeal to law. In some cases, it is true, a legal decision may be the most satisfactory solution ; but as the process is very expensive, and the position of litigants generally indicates or leads to some hostility of feeling, and inasmuch as claims are very numerous—of hourly occurrence, so that it may probably be stated that a claim large or small arises upon one policy in every five effected, taking the various trades together—a constant recourse to law would be most undesirable, and must eventually overthrow the system of insurance. Such a remedy is found under the head of Arbitration. There is something quite consistent with friendly feeling in offering to leave to another's decision the opposing views which two persons entertain upon a difficult subject. And when it is borne in mind how seldom questions arising out of the transactions we have been considering are pure and simple, or resolve themselves into the mere form of "yes" or "no," but, on the other hand, how often small equitable rights are found on both sides and accessory matters are discovered, which have to be discussed *pro* and *con*, and all bring in their weight, it is not won-

derful that arbitration has been a favourite resource, and has been a valuable reconciling medium between men of business.

Number of Arbitrators.

When it is determined to leave a matter to arbitration or to reference,—for it is indifferent which term is used,—the first step is to decide on arbitrator or arbitrators. Certain qualifications are necessary in those who accept the office, of which integrity, independence, and knowledge of the subject about which the disagreement arises are the principal. It is usual either to have the case decided by a single arbitrator or by three; experience having shown that two referees, if they once take opposite views, might never be able to bring the matter to a conclusion: and as the award would require to be signed by both, that could only be done by one of the two being induced to change his particular ideas and being won over to those of his colleague; otherwise the case could not be concluded at all. Whenever, therefore, two arbitrators are named, it is always with the condition that they *may* or *must* choose a third arbitrator or umpire. The distinction between a third arbitrator and an umpire is this:—a third arbitrator is a person who sits with the other two, and by the preponderance of his opinion brings about a conclusion; or who signs the award with one of the other referees in cases where there is an insuperable disagreement of views between the two first arbitrators, and in which the submission gives power that the award may be signed by all three, or, in case of disagreement, by any two of the arbitrators. All three of the referees are judges and

have equal authority ; but practically the third gains a little more than an equal share, partly from the concession of the other two, and from being the object of choice by the original referees, which selection would probably result from the greater knowledge or ability which he was known to possess about the matter in dispute. The office of an umpire, when umpirage is provided for by the submission, is to take effect in the event of the arbitrators disagreeing ; and then his authority is to commence. His award, signed only by himself, will be binding, and he has to hear the evidence which is adduced by each side, although it may have been previously given to the two arbitrators. It may however be arranged by the submission that the umpire is excused from taking the evidence *de novo*, and may gather it from the arbitrators' notes. There will be occasion, farther on, to speak more particularly of the umpire's position and duty.

Decisions by three arbitrators are much more common in cases which are not referred out of court than those by a single referee : and this from an obvious reason, viz., the great improbability of both disputants selecting or agreeing to the same person for their arbitrator. There are, however, frequent instances of awards made by one referee, and matters are often referred out of court to a single barrister, accountant, &c. The practical difficulty arises out of that bias which exists or is supposed to exist in a person who is nominated by his own friend or connection in business. The man who nominates him may have already heard him express an opinion on the subject which would be favourable to his cause. Moreover, the responsibility to the single referee

is greater than when he forms one of three; and supposing both parties who agree to refer a matter to him be equally associated with him by the ties of friendship or business, he may object to giving a decision which will cause one of the two to be the loser.

It becomes, therefore, an easier matter for each party disputing to name a separate arbitrator, because it does not require the assent of the opponent in doing so. It is true that in proceeding thus, the character of the two referees apparently becomes essentially changed: they seem *de facto*, to a greater or less extent, advocates or partisans of the two parties who select them, and can only by a fiction be supposed to sit down with the same independence of thought and feeling to discuss the question in hand as if they were unprejudiced by feelings of friendship, or were not committed to some opinion previously given. Yet there is no practical objection to this course. The difficulty is rectified by their joint appointment of a third arbitrator or umpire. When he is fixed on every question is capable of solution, because, as it will be seen hereafter, the signing of the award by two of the three is sufficient to make it complete and binding; so that in every case the umpire can either decide the issue between the other two arbitrators, or, as Third, give his casting vote on the side to which his own judgment preponderates.

The position, then, of the first two referees becomes very similar to that of advocates or counsel in court. The office of the third, or umpire, is almost identical with that of a judge. As there is no longer any delicacy in each disputant naming a person on his side whose views he already knows or suspects, the matter is likely to be

sifted with the same fulness and severity as it would be in court. The whole rationale of the system of trying causes and of having them argued before a judge by counsel, who are *professedly* the partisans of their own clients, is this: that men are not *all-sided*; they cannot see equally each aspect of a subject. They may be able to acquire a very perfect knowledge of one side—one hemisphere; they will become so impressed by what they consider the truth they have espoused that each will put before the judge or the jury one side of the contention with a completeness, an astuteness and an eloquence which seems convincing, until his adversary argues on behalf of *his* client's case as logically and as rhetorically. What then? The practised and independent judgment of the court has had laid before it the results of the most laborious investigation, and the discoveries of the most acute eyes. The judge wants but this to decide according to law or equity.

Of course, on the selection of the umpire will very much depend the result of the arbitration. Each referee has liberty to bring forward names till one has been chosen who is unobjectionable. It may be said that there will still be danger of bias or partiality. Possibly so. But granting this, can any means be shown better adapted to avoid it? Even drawing lots for an umpire has been resorted to: and though it is not a means to be recommended, it was held not to make an award bad necessarily; but it would vitiate, if the umpire so elected were known to one of the arbitrators only.*

* *Wolfe & Crossley v. European Steamship Co.*, Common Pleas, 1860, L. T. R. 373.

Arbitrators must know how to proceed.

Another qualification required in an arbitrator, besides integrity and knowledge of the subject submitted, is that he should know the *modus operandi*; that he should be acquainted with the steps by which he is to proceed. He must, at least, know something of the office and position he takes, and the danger of making false steps. An award very laboriously made may prove utterly useless through some informality or mistake. An award which was intended to avoid law proceedings may itself be carried into court and be fiercely litigated. Silence must seal the lips of the arbitrator; for a single inadvertent disclosure after an award has been made may cause the upsetting of all that has been done. It is generally desirable that the arbitrator should be to some extent practised; and he should be able to scan the proceedings with his eye, and see that all is in order. A referee, especially when he sits as sole arbitrator, is often selected on account of his eminent acquaintance with the subject in dispute. His known or expressed opinions, even on the particular case which he has to decide, if previously given, do not disqualify him from acting, or render his award invalid. In *Hutchinson v. Hayward*,* a broker, who was sole referee, wrote a letter expressing his view on certain allowances to be made, and stated the allowance or rate in that letter. The award, of which the subject-matter was the rate or quantum of allowance, was not set aside on account of the previously written opinion, the Court holding that the arbitrator

* Bail, 1866, L. T. R. 15, 201.

was not guilty of such misconduct as would vitiate an award. We may gather from this that an Average-adjuster who has made a statement is not unfitted thereby for sitting on the same matter as an arbitrator.

Legal and other Assistance.

In arbitrations of importance the arbitrators are often attended by counsel or the solicitors of each side, and the documentation and formalities are performed under their superintendence or by them. Still looking to arbitration as a means rather to avoid law, it is a good thing when matters can be safely left in the hands of arbitrators without other interference or assistance. A middle course is to have the documents drawn by one or more public notaries, some of whom are so much acquainted with what is necessary at all stages, that they are quite depositaries of this technical learning. In some submissions to arbitration the absence of solicitors is expressly stipulated.

What Persons may refer.

There is hardly any limitation in this respect with persons who are interested either directly, or with powers as agents, in property or rights: and in *Goodson v. Brooke* * it was held, that a person who underwrote policies for another and settled losses for him had an implied authority to refer a dispute in reference to a loss to arbitration. So attorneys with a general power to act for their clients can bind them by a reference; but

* 4 Camp. 163.

if an attorney submits without authority he alone is bound.*

Of the Submission.

As was mentioned when speaking of the act of Abandonment, it is rather the spirit and intention of the parties in correlation than forms of words which are to be considered. Indeed, a parol submission may be made, and indirect expressions may bear the construction that they submit certain matters to arbitration. But it is of great advantage to have a document properly drawn up, in which are stated the points in dispute left to the arbitrator's decision. And there is this distinction about a parol submission, that the award grounded on it cannot be made a rule of court;† and there are some other inconveniences. When the form of submission is an agreement, it requires one ordinary agreement stamp if the subject-matter be above twenty pounds. Submissions are also made by mutual bonds with proper stamps, and under penalty; or they may be in a joint bond to the arbitrator covenanting to perform the award he shall make.

As to the immediate effect which a submission has, the mere inchoation of a reference will not bar an action brought on the subject-matter of it; nor can a provision, such as a clause in a policy that all disputes shall be settled by arbitration, deprive courts of common

* See Mr. Russell's valuable "Treatise on the Power and Duty of an Arbitrator."

† Even though the submission be made in pursuance of a general written agreement to refer all disputes to arbitration. *Ex parte Glaisher*, Exch. 1865, L. T. R. 638.

law of their right of judication.* Nevertheless if the matter be somewhat advanced, and all parties have agreed to the reference, the Act of 17 & 18 Victoria gives power to the court in which an action is brought to stay proceedings in the suit.

The generality of insurance clubs introduce in their rules what is called the Arbitration Clause; which is a provision intended to obviate, and indeed bar, proceedings in law should dissatisfaction or disputes arise on the claims of suffering members. In most clubs it is made a condition precedent to an action at law, that the question have been submitted to arbitration. At first there was a doubt how far such a clause would be binding as barring an action in law brought by a suffering member, even if he had been a consenting party to its introduction; though certainly those who make by-laws are usually expected to abide by their own legislation. But the effects of such an obstacle to a legal decision might be felt by others beyond the member who claims, individually, and the law is slow to recognize a principle that might act injuriously to innocent parties; and, also, it does not with a very good grace affirm an arrangement which apparently has a tendency to oust the law-courts of their jurisdiction. Yet in the case of *Scott v. Avery* † the court did not object to support the arbitration clause which made an award of arbitrators a preceding step to a lawsuit.

* But it would appear by Lord Campbell's judgment in *Blyth v. Lafone*, Q. B. Jan. 1859, that if an agreement to refer be contained in the instrument itself out of which the dispute arises, it does confer on the superior courts the power to stay proceedings in an action.

† 8 Ex. 487.

As the steps in a reference by disputing parties are mutual, and are, as it were, a concession for the avoiding of strife, the matter should advance on both sides *pari passu*, and neither side is to take or receive any advantage which the other has not. The appointment of an arbitrator must therefore be notified immediately to the other side; and where the appointment is limited to a certain day the notification must be made on the same day.

It should be observed that there is a very great difference as to the degree of formality necessary to be used in submissions to arbitration when they do not take their rise *lite pendente*—out of proceedings already going on in law or equity. When both parties to a question are assured of the good faith of their opponent, and quite agree to avoid unpleasant discussion by letting the matter be settled by one or more arbitrators, a very informal manner of doing it is often employed. Thus on a policy of insurance, it is common enough to write simply,—“We agree to refer all matters in dispute to the decision of A. ;” or “to the decision of A. and B., with power to them to appoint a third.” Indeed we often observe that, in contradiction of the received maxim, Fast bind, fast find, men stand to agreements which are protected only by good faith and honour, as loyally as when they are tied to them with the fetters of legal exactness. With some persons, the very feeling of being bound by a multitude of words induces the thought of escape by flaws. A man in prison considers himself tacitly challenged to break out if he can.

But when people do not know one another well, or

when there is danger or disagreement, exactitude becomes the best and shortest road to a conclusion. In such cases nothing is gained by a slipshod manner of proceeding, and it is desirable to secure every step in a formal way.

When references are made out of court, it is common to agree that they shall be made on "*the usual terms* ; or on usual terms with specified limitations. It will be of service to know what the law holds to be "usual terms," and a summary is thus given by Mr. Russell : "In such an order it is always specially arranged whether its terms are to apply to matters in the cause only, or are to extend further. Very frequently 'all other matters in difference between the parties' are referred with the cause. In either case, by agreeing to a reference 'on the usual terms' the parties consent that the arbitrators shall direct whether the verdict is to be for the plaintiff or defendant, and if for the plaintiff, for what amount of damages (not exceeding, however, a specified amount) it is to be entered. They consent, also, that the costs of the cause shall abide the event of the arbitrator's decision in the action, but that the costs of the reference and award shall be in his discretion. Practically, they give the arbitrator an unlimited time for making his award. The death of either party is not to abate his authority. They agree that he shall have power to amend the record, and to certify as a judge at *Nisi Prius*. They further agree to do whatever he may think fit to direct respecting the matters referred. The evidence is to be taken on oath. It *was* discretionary with the arbitrator to examine the parties: probably this term will be omitted in future, as the parties now

have *a right* to give evidence. They agree, also, to produce all documents relating to the matters referred. They agree, farther, to obey his award, and to bring no writ of error, action at law, or suit in equity, respecting the matters referred against the arbitrator or each other. They consent, too, that if either of them wilfully prevent the arbitrator making an award, he will pay such costs to the other as the court shall think fit, and that if either party dispute the validity of the award, the court may refer the matters, or any of them, back to the arbitrator to reconsider. They, lastly, consent that the order itself may be made a rule of court.”*

Of subsequent Proceedings.

When the verbal or written agreement, the deed of reference, or the bond under penalty, has been made perfect, and an entrance is effected by any one of these doors to the business of arbitration, the matter is to proceed without intentional or unnecessary delay. In the more formal cases, and especially those referred out of court, if either party to the submission cause intentional delays, or take any step that shall interrupt the progress or defeat the intention of the reference, he lays himself open to punishment, which may be administered in two or three different ways.

As the sitting of arbitrators is a domestic court of justice, a strict and serious procedure is to be observed, worthy of the high purpose of the administration of justice which is to be made there. The resemblance to the tribunals of judicature is stricter than is at first imagined, although from the economic paucity of the

* Russell, page 81.

persons taking part, some of the actors appear in more than one character. The umpire is the true judge—but he is also the jury; the two original referees are associate judges, but they are also, to some extent, advocates: solicitors are sometimes really present in person, sometimes they are dispensed with; then there are the witnesses, and they are or may be examined on oath. Finally, the award itself by being made a rule of court becomes invested with a real force, such as surrounds the formal actions of equity and law.

The first necessary step for the two arbitrators who have been appointed, one by each side, is to agree upon and to appoint an umpire. In most cases where three referees are contemplated this is a proceeding necessary *in limine*; and until the umpire has been selected and has given his consent to act no other business can be done in the matter. On the choice of the third, or umpire, much depends. He should be a man of perfectly upright character, possessing a clear and logical mind, and generally acquainted with the subject-matter of the questions to come before him. It is not to be insisted that he, or either of the other two arbitrators, is to be without interest in the result of the arbitration. This could scarcely be in practice, for men of business are so affected, directly or indirectly, by decisions for or against their cotemporaries, that there are few who are not entangled in the web. When the important fact of the umpire has been decided, his nomination is written on whatever instrument may be the formal submission, and then it is to be communicated to himself, and he must signify his consent to act with his co-referees in the business.

At the first joint meeting of all the referees they will take the initiative by reading the agreement or other form of submission under which they are appointed; they will observe the number and scope of the points submitted to their decision, and the powers conferred upon them. It is of the utmost importance that arbitrators should not travel out of the record, or introduce in their award questions which have not been left to their adjudication.* They will take notice how the costs in the suit (if there be one) and the costs of the reference are to be dealt with: they will see what limitation of time is made for them to perfect their award, and what liberty they have to enlarge the time, if insufficient. If the submission be in very general terms, so as to leave "all matters and question between the parties" to the decision of the arbitrators, it will scarcely be possible for them to exceed their jurisdiction. And so much deference and consideration is usually shown to the arbitrators' tribunal by the judges and courts, so beneficial is it felt to be that questions relating to property and commercial matters should be settled in a quiet and non-legal way, that a liberty is allowed to arbitrators which does not exist in more solemn tribunals; the referees are permitted to wander at pleasure through the domains of equity and law, civil, commercial, and canon; to consult their own notions of abstract justice; to decide on motives, and trace out rudimentary intentions—with a freedom which could not be permitted to regularly con-

* So in the matter of *The Iris*, the umpire awarded that a cargo of seed should be taken back, when it was only left to him to say what amount should be allowed for damage. The award was set aside; but there was a second ground for so doing. *Delcomyn, Badart & Brooks*, C. P. 1864.

stituted courts. Even though the arbitrators' decision go beyond or against existing laws, yet if it be arrived at in *bonâ fide*, and its result is not mischievous but beneficial, the utmost leniency will be shown towards an award thus characterised ; its irregularities will be condoned and its extra-legal flights be supported. With a parental indulgence, Westminster Hall and Lincoln's Inn allow in these imperfect benches a latitude which they are themselves denied. But this concession to the acts of arbitrators, having a design to facilitate the arrangement of differences between contending parties, and to prevent every pair of disputants from rushing into the legal forum, must not encourage rash views or laxity of procedure on their part. They are bound to proceed to the best of their ability, with care and caution, according to established formulæ and in concurrence with such precedents and decisions as they can discover ; for it is certainly not the way to bring a dispute to an end for the referees by blunders or laches to leave the result open, to be ripped up by either of the contending parties.

As the arbitrators will be careful to confine themselves to the subject-matter left to their decision, so they will carefully observe the dates between which their arbitrament is limited : and unless there is something in the submission which relates to prospective claims, interest, &c., they will not exceed the question as it stood on the day on which the submission was signed. Nevertheless, it may well be left to them to calculate interest up to the time of the award being signed or paid, or to deal with events which were impending, but not matters of fact, at the time of the signing of the submission, if so intended

by the contending parties. And as to the costs of the arbitration itself, they are necessarily future, and yet must be dealt with. These are, however, rather an incident of the matter submitted than any additional matter, and are, therefore, not much in point.

These preliminaries being settled, and the three arbitrators having met together on the appointed day in a place agreed upon, notice of time and place having also been given to the parties concerned, the arbitration commences. It is begun without form or ceremony. If counsel or solicitors attend, they may indeed think it necessary to proceed *secundum artem* by opening the case and stating the facts on either side in a speech ; but when the matter lies entirely with mercantile men, this is dispensed with, and an immediate inquiry is made as to the question which the parties have in discussion.

Yet though the place of meeting be at the office or rooms of one or other of the arbitrators, or at some tavern or public room, and the proceedings be divested as much as possible of superfluous circumstance, it must be remembered that the arbitrators' chamber is nevertheless a miniature court of justice, and the proceedings, though not having a legal appearance, should at least be regular and business-like. Allusion has already been made to the practical bearing of an arbitrator being chosen on each side of the question. As there can be no objection made on the part of A. that the referee named by B. is B.'s friend, and had heard a great deal of B.'s side of the dispute before his appointment, and *vice versa* as to the other side, so it must necessarily happen in many cases that one arbitrator comes well informed on his nominator's views and objects, and the other comes

equally prepared on behalf of the person's interest from whom he received his appointment. And thus little time need be lost ; the one referee is able to give a clear and forcible account of the transaction *ex parte*, showing the grounds of his nominator's contention, and the second arbitrator shows the causes and reasons against what has been put forward, or sets out his nominator's claim, and so the matter is fully stated for the information of the umpire, and is ripe for an entrance into the documentary and *viva voce* proofs. Only it is to be remarked that though this siding of the two first arbitrators is a fact the origin of which is in human nature, they are not to forget their character of judge, whilst it may be convenient in the outset for them to speak somewhat as advocates. They will do violence to their simple predilections and prejudice, and open their ears and stimulate their judging powers to give a fair and impartial consideration to the facts as they will be discovered as the arbitration goes on. If they do not do this they are ignorant and unworthy of their office ; and should one or other of them exhibit by his words or gestures gross partiality or a predetermination to wrest the cause to his side, it may offer fair ground for the parties revoking the authority given to the referees, and so stopping the arbitration from proceeding.*

The greatest fairness therefore is to be studiously observed. If it be possible, both parties should be present or represented whenever evidence is given. All that either party has to say should be said not privately

* It appears that under certain circumstances, a Court of Equity will interfere to prevent an arbitrator making an award. *Pickering v. Cape Town Rail and Dock Co.* V.-C. Wood, 1865. L. T. R. 357.

to one of the arbitrators, but openly at a sitting of the referees. It is not meant that during the pendency of an arbitration a referee may not converse with his nominator or gather information for his own guidance on subjects connected with the matter in hand. For these little courts of judicature are eminently practical in their character, and seek to arrive rapidly at correct conclusions, and not to exhaust themselves with technical difficulties and restrictions.

In *Delcomyn, Badart, and Brooks* (Com. Pleas, 1867), an award was set aside. The umpire received evidence and examined samples of seed when one of the two parties to the reference was not present. Chief Justice COCKBURN, remarking on the case, said, "the contract was, that the reference should be held 'in the usual way'; but, in his opinion, the decision of the umpire had been arrived at contrary to the known principles of law." And again, "I have an extreme desire to support the usage of merchants, and to give effect to their arbitration, unless a principle of more importance compels me to upset their conclusion. I am clear that parties might, if they liked, leave the question absolutely to the discretion of the referee, to be decided upon any evidence he might choose, and in any manner he might dictate." In this case such a liberty had not been given to the referee.

In *Thomas v. Morris*,* when a sole arbitrator received evidence in the absence of both parties to the reference, the award was not set aside by the Court, because there were circumstances which acted as a waiver, by each party, of any irregularity. The Court took occasion,

* Bail Court, 1867. L. T. R. 397.

however, to state that they did not wish to express their approval of the arbitrators taking evidence in the parties' absence, or in otherwise deviating from established practice.

The evidence is taken in the usual manner, and the witnesses are examined either on oath or without that solemnity. Arbitrators have power to administer oaths to witnesses, but it is not invariably done, as it frequently happens that both parties to a reference are satisfied with the mere assertions of the persons examined; and this may the more often be the case on account of arbitrations being resorted to very much in questions relative to custom of trade, state of account, usage of Lloyd's, &c., where the facts are not so much disputed as is the practical bearing of certain speculative principles. It is also frequently left to the opposite parties to the arbitration to produce evidence and witnesses in support of their case; but when a reference is made by rule or order of Court the attendance of witnesses is rendered compulsory by an Act passed in the third and fourth years of William IV. It may be added that, again, in regard to the oath the arbitrator is not bound to use any specified form in administering it.

In proceeding with the award the arbitrators should go on with due diligence, yet not with unseemly haste. It is a gratification to most persons to be allowed to say out what they have to say, and to be listened to with attention. Arbitrators should not go to a conclusion *per saltum*, but hear what each side has to adduce. Mr. Russell, in the Treatise already mentioned, recommends "as a general practice, that the arbitrator should carefully take notes in writing of everything material stated

by the witnesses, in order that he may be enabled to do full justice between the parties, by going over the whole collectively and deliberately, by accurately comparing what a witness says at first with what he admits on cross-examination, and what one witness states with what a second witness deposes to. Even if the case is so short that the arbitrator can safely trust to carrying all the evidence in his head, it is advisable that there should be written minutes of the evidence, in case any ulterior proceeding be taken on the award, and the arbitrator be required to give information respecting the proceedings before him." (P. 189.)

Limitation of Time.

It is important and desirable in most cases that an award, which is to put an end to strife, should be made within a reasonable time. There are other obvious reasons why the time should not run on indefinitely, such as the chances of the death or the solvency of parties, the fluctuating value of property, the interest of money, and the like. It, therefore, forms part of many or most submissions to appoint a fixed time within which the award must be made. But it is a mistake to suppose that a limit of time is invariably necessary. Its introduction is optional, and, on the whole, advisable. If no limitation be made in the submission, the power of the arbitrators is abrogated by the following three acts; viz., the making of the award, the revocation of arbitrator's office and powers by one or both of the parties, or the death of the arbitrator. In common law, set limits have been fixed as to time. In other arbitrations, if a limita-

tion of time have been made in the submission it must be adhered to, and it is as binding on the arbitrators as any other condition would be.

But the restriction as to time introduced in the submission is usually accompanied by a power granted to arbitrators that they may enlarge the time if necessary: so that it does not seem to amount to much. That power must only be exercised during the currency of the functions of the arbitrators as originally prescribed; *i.e.*, neither before they were actually empowered, nor after the limited time has expired. Thus, as to the wrong exercise of the power by anticipation; if the appointment of a third arbitrator, or umpire, be a condition precedent to making the award, the enlargement of the time cannot be made by two out of the three, it must be made after the appointment of the umpire. The power to enlarge is lost if the arbitrators suffer the last day originally named to slip, without writing on the submission that they enlarge the time; and although the power of the arbitrators may seem to revive, by both parties to the reference agreeing after the expiry of the original time that there should be an enlargement, it is virtually making a new submission, and necessitates a fresh stamp. In *Watson v. Beaver* (Exch., 8 June, 1860) the Court pronounced its power to enlarge the time for making an award in a reference under the Common Law Procedure Act, of 1854, where the three months had expired since the arbitrator's appointment, and he had made a void award after the expiration of that limited time.

As to the form in which the enlargement is made, it is immaterial; and it has been held that a verbal enlargement made by the arbitrators and not dissented

from by the parties was a valid enlargement; but in general it should be made in writing. A power once given to enlarge the time may be exercised by the arbitrators in a succession of acts; it is not confined to one performance. In cases referred out of court, the court can itself enlarge the time, even though the arbitrators do not do so. Mr. Russell quotes an authority in stating, that when "months" only are spoken of for limiting time, without explaining what sort of month is intended, *lunar months* are to be taken. This appears remarkable; since, in common parlance, when we mention months we are generally understood to mean the months of the calendar.

Arbitrators' Powers rescinded.

The powers of the arbitrators may be revoked and annulled by the withdrawal of the authority by the parties to the submission. This may be rendered necessary by the arbitrator showing himself an unfit man, or that he is actuated by private and personal motives. But by the Act 3 & 4 William IV., when a submission is made a rule of court, a revocation by one of the parties will not be allowed unless by leave of court. And the reason for this is, that the power in the referring parties to revoke has been much abused. It was an easy escape for one of the two referring parties, the one who discovers through some channel that the award is to be made against him, to revoke his authority and thus stultify the proceedings and prevent an award being made.

When a female is party to a reference, her marriage revokes the authority she had given to the arbitrators. This is on the well-known principle of the female's

individuality merging, by marriage, in her husband ; and it acts as her death would do. The death of one of two parties to a reference will dissolve the arbitrators' authority and terminate proceedings, unless this contingency has been specially provided against in the submission. The death of one of the arbitrators would in general practically revoke the powers of the remaining two ; and, as in the case of the death of a juror, proceedings must begin *de novo* : for all the arbitrators must be cognizant of all the evidence and case equally. The bankruptcy or insolvency of either of the parties to the reference does not necessarily revoke the arbitrator's authority.

“ When one submission includes several parties on the same side, who have each of them separate interests, the death of one avoids the submission only as to him. Thus when the owners of a ship and the several freighters, who had distinct interests in the cargo, submitted some differences which had arisen to arbitration, it was holden that the death of one of the freighters, before the award made, affected it only as to him, and was no revocation as to the others.”*

Inquiries by Arbitrators for their own Guidance.

The particular selection of an arbitrator is usually on account of the knowledge of the subject in question which he is supposed to possess, or from the integrity of his character. It is very possible for a man to be upright and to have a fair general acquaintance with the subject in dispute, and yet require technical informa-

* Russell, page 167. And for a late case of revocation of an arbitrator's power, see the end of this chapter.

tion on certain points. These may not be questions of fact such as are put in evidence, but opinions, and the results of personal observation through a course of years, or other information which the arbitrator finds necessary, to form his own judgment. No doubt he is at liberty to avail himself of all means of information within his reach, and to make exact inquiries when his own knowledge is insufficient. Besides the evidence relating to facts, he may confirm or modify his own views by having recourse to books and skilled persons. At the same time, whilst availing himself of their knowledge and views, he is not to delegate his own office, that of judging and determining, himself, the points submitted to him. Nay, arbitrators must not delegate their personal authority even to each other, although one of them be eminently qualified from his knowledge to almost decide the point. Thus, suppose in a shipping case two merchants were to call in a third, on account of his special knowledge of the subject, as, for instance, a shipbuilder on a point of construction, or an ex-shipmaster on subjects of navigation, &c., yet the other arbitrators must not place the decision of the question in his hands when he is only a third assessor, although they would do so if he were an umpire. Nevertheless, they might be very much guided by the views stated by the third arbitrator; but the principle of a joint conclusion is to be upheld.

Umpire.

The distinction between an umpire and a third arbitrator has already been briefly alluded to. Whilst a third arbitrator assists the other two, and his vote or

opinion will make a majority where there is an insuperable difference between the first two referees, an umpire is clothed with independent powers and has a separate action. He is to decide alone, should the arbitrators differ. A third arbitrator reconciles the discordant views of his colleagues, or decides between them; but the umpire decides between the original parties to the reference. He has to begin the case again, he examines the witnesses himself, except when the parties agree that he should take the evidence already collected by the arbitrators, from their notes; he makes his award without reference to any which the arbitrators may have drawn, and his award is to be complete, and to comprehend in itself all the points in dispute, although upon some of them the two arbitrators were unanimous.

It appears that the appointment of an umpire by parol is sometimes sufficient; but it must be added that, in all cases when proceedings are already by documents, it is safer and more conclusive to have written evidence of his appointment, and, indeed, to have documentary proof of all steps in the business. If the deed of submission to two arbitrators be silent as to the appointment of an umpire, the present law gives them the power to appoint one themselves; but if the submission contains any provision on that subject they are not permitted to run counter to it.*

* Formerly, another term for umpire was that of Days-man, *q.d.*, Daïsman; that is, one who sits on a raised daïs or under a canopy, as signifying a higher position than his co-assessors. So the umpire is clothed with some superior authority, even in sitting with the arbitrators who selected him for his office. In the Book of Job, *A.V.*, the word Daysman is used in the sense above indicated. (Chap. ix. 33.)

Regularity of Proceedings.

That propriety and regularity should characterize the proceedings of a reference would be inferred, and has already been pressed. There must be a careful attention to perfect justice and impartiality towards all parties. The referees require to bear in mind that their office is to terminate contention; also, that it is not a difficult matter to upset an award on the score of irregularity; and therefore it is their duty to make such an award as will be good and consequently effective,—otherwise all their labour may prove not only useless but mischievous.

With an eye to such exactitude the arbitrators will only take evidence when both parties are present: this gives the opportunity of cross-examination, or at least a rigorous investigation.* But then it is not permitted to one of the parties who have signed a submission to act vexatiously, or to frustrate the justice which would be done by absenting himself from the meetings after having been duly notified of them. Should he do this, the arbitrators will give the absentee notice of their intention, and will then proceed with the reference without him. Such proceedings are called *ex parte*.†

Should the arbitrators, without bad intention, deviate somewhat from regularity, so that, in consequence, their award might in strictness be set aside, the prejudicial effect of such irregularity may be done away by the

* See *ante*.

† In *Tryer v. Shaw*, Exch. May, 1858, where one party to an arbitration went away prematurely, under a mistaken supposition that there would be notice of another meeting, and the arbitrator made his award *ex parte*, the Court would not disturb the award.

sanction of the parties to the reference ; and this either by word, or even by such conduct as is significant of their assent to the irregular course of the proceedings.*

Drawing the Award, &c.

When the arbitrators have come to their decision on the one or several points submitted to them, they put the results of their judicial inquiries into a form called the Award. This is either drawn by a solicitor, a notary, or in many cases it is done by themselves. When a solicitor or a notary is employed to draw the award it should not be the same person who drew the submission, inasmuch as his being acquainted with the beginning and the end of the transaction would be putting a power in his hands which might be turned to an improper purpose ; and until an award is taken up and published, secrecy is all-important. If the reference be to three persons, all, or the majority in case one is dissident, are to sign the award. They are to sign it together at the same time and place ; the principle of unity of opinion and action is to be maintained to the latest.†

But one of the arbitrators may entertain so strong a feeling against the award that he may refuse to sign it. That case is usually provided for by the submission containing a provision which allows any two of the arbitrators to sign the award ; so that the award may be good

* See *ante*.

† But in *Anning v. Hartley*, Exch. Jan. 1858, the Court upheld an award in spite of some irregularities in signing and taking evidence, but involving no misconduct of arbitrators : and it preferred sending it back to the referees for rectification. And in doing this it was held that there was no necessity for notices to the parties.

and binding although only two out of three signatures are appended to it. If, however, the submission do not contain this proviso, the award would not be valid unless coterminously signed by the three referees. If one of the arbitrators stays away from the place where the other two are met to sign, due notice must be sent him of the intended meeting; and then, if he persists in segregating himself from his colleagues, the signatures of the other two will be enough to give force to the award.

When the award is once signed the arbitrator's power ceases. He cannot amend his award or add anything to it. It is, as it were, out of his reach, and he may not even correct clerical errors in it, not even such a mistake as gives to the writing a meaning directly opposite to that which the arbitrators intended it should have, and which error could be clearly shown to be one.

The award must embrace and deal with all the points submitted to the arbitrators. It must not decide questions not left to the arbitrator's judgment, nor give a decision apart from the question submitted. Thus, in a boundary question between this country and America when it was left to the King of Holland to decide whether the boundary was to be a range of hills A, or a range of hills C, and the royal arbitrator decided as to neither of them, but named a third and intermediate line, B, for the boundary. His award was rejected, because it was not left to him generally to state where he thought a boundary should be, but only which of two lines he adjudged to be the boundary.

“The award must always go to the point in dispute, and is not to substitute some other alternative as a settlement of the question.”

It must, however, be stated that there is a good deal of conflict in the judgments relative to awards ; so that after having apparently distinguished a principle, there is found to be a deduction from certainty by one or more decisions opposing the general doctrine. Thus, though it has been mentioned, above, that it is out of the power of the arbitrators to alter or correct an award once complete, yet we shall hereafter see that under certain circumstances awards are remitted to those who made them, for emendation. Again, although it has been shown that anxious care is necessary to guard against error, excess, or defect in the award, and, indeed, in each step of the proceedings, yet such leniency has sometimes been shown by the Court respecting small errors committed in drawing an award, as to give one the impression that these little mistakes do not interfere with the substantiality of the award. Mr. Russell says on this point, "A close examination of the cases compels one to say that one uniform principle has not been adhered to as to the consequences of a mistake. Greater latitude was allowed formerly in reviewing the arbitrator's judgment than the courts would be disposed to admit at present." So, in general, errors appearing on the face of an award will cause it to be set aside ; yet in a modern case* where there was an omission made in respect of the costs of sending the award back, the court supported the award, and would not suffer it to be quashed by an error that lay, as it were, on the surface, and did not go to the subject-matter so as to taint that.

* *Bell v. Postlethwaite*, Q. B. 1856. And in *Kendil v. Merrett*, the Court went so far as to alter the Order of Reference after the Award had been made.

Nevertheless, it may be safely said that a gross error will affect an award, particularly if the arbitrators themselves admit that they were misinformed or otherwise mistaken; although several decisions might be quoted to show the disinclination which courts of law and equity have to disturb awards when made; and they shelter themselves under the assertion that courts have no jurisdiction to correct the mistake if there were one.

There is no disposition among judges now to encourage or increase litigation. There was a time when the unwholesome system of allowing judges to receive remuneration by fees led, as a natural consequence, to the desire to draw the largest quantity of business to their courts, and conversely, induced a great jealousy of any attempt "to oust the courts of their jurisdiction."* With a fixed stipend, and that immaculate character which happily invests the judicature of this country, no such desire to promote litigation now exists in the minds of judges. They find labour enough in disposing of the business which necessarily comes before them, and are sincerely desirous to see contentions between parties arranged by arbitration, or any other means outside the walls of the court. They, therefore, give the utmost encouragement to what has been called the domestic tribunal; and in the case of *Scott v. Avery*,† gave effect

* It is certain that in former times a stronger suasion even than fees was used with judges. There were secret gifts,—such as eclipsed the glory of the great Lord Bacon. Allusions both to fees and bribes are to be found in the cotemporaneous literature. Thus Jeremy Taylor, in the seventeenth century, says, "And some judges have lessened themselves by fear and cowardice, by *bribery* and flattery, by iniquity and compliance; and where they have not, yet they have notices of few causes."

† 5 H. of L. Cases, 811; S. C. Cam. Scacc., 8 Ex. 497.

to a club rule which made arbitration a condition precedent to legal action,—a previous step interposed on which the strife might frequently expire.

Therefore it is that the losing party cannot appeal to a court of law or equity from an award of arbitrators. Courts will not take cognizance in that manner. Flaws may be found, the regularity of proceedings may be impeached, and grounds may be established by which the award may be upset. But the chain which a disputant himself placed in the hands of arbitrators, if once properly fastened round his neck, courts will not unshackle. A court will, however, go to the extent, having first the consent of both parties, of inquiring of the arbitrator the grounds of his decision. If it were found, then, that it had proceeded under some gross error or misapprehension, it might lead to the award being quashed.

With the same view of the desirableness of supporting awards, the court will dissect the arbitrator's written decision, and separate the good it contains from the bad. So that, like some other documents, an award may be good in part and bad in part; and the circumstance of its mixed character will not by necessity defeat the whole instrument, but the portion which can be sustained will be severed, and will have force.

An award is, notwithstanding its privileged character, not indestructible: and it may be bad enough in itself to be set aside; as if, for example, it be proved that a fact submitted is not decided by it. It is obvious that a procedure which is intended to be an end of controversy must not itself be vague, incomplete or indefinite, for in such a case it fails signally in its primary intention and its beneficial use.

Form of the Award.

As to the form in which the award is given, it is as various as the forms of submission, or the course of the proceedings. It is regulated very much by the circumstances which gave birth to it. It may be by parol, or, if written, it may consist of a few words signed by the arbitrator or arbitrators without preamble. On the other hand, the submission may have been exact, the reference may have been out of court, the arbitrator a barrister, the subject-matter intricate, the disputants angry, solicitors may have attended the proceedings, and counsel been heard at the meetings. In this case the award will of necessity require to be in accordance with the preceding steps in form and exactness. It will be introduced by a preamble which will specify the matters in difference left to the arbitrator's decision. "Any provisions of the submission which are necessary to warrant particular directions, as, for instance, respecting costs, or saying what should be done, ought to be set forth. It is not necessary that the award should specify what the matters in difference are; but as questions, difficult of proof, may sometimes arise long after the award has been made whether certain matters were matters in difference at the time of the submission, it has been recommended as a convenient course in many cases that the recital should specify the subjects in difference, and that the disposing part of the award should refer to them; because in an action subsequently brought on any of the matters referred, the award would then give a complete and indisputable defence."* After such a preamble the arbitrators

* Russell on "Power, &c., of Arb.," 252.

will probably, for their own justification and for the support of their award, declare that they have made it "of and concerning the premisses."

It is not even imperative that the award should be made in writing, unless so specified in the submission. It may be delivered by word of mouth and yet be valid. This kind of award, however, will rarely be advisable; and as words uttered may be misunderstood or misreported, it will be generally the desire of the arbitrator, as well as the parties submitting, that the exacter method of writing should be used; nay, the litigants would consider a written award their due, though not specified in the submission.

If the award be formal, or likely to be brought into court, it is incumbent that it should be stamped. It is not necessary, however, that it should be written on stamped paper,—it may be stamped at any time subsequently.

Of Publication and Delivery.

It is often a stipulation that the award shall be published. Whatever may have been the original of the word "publication," a very limited publicity now suffices. Any act that can be called public, after the award is made, will fulfil the condition,—such as reading it over to the persons who attest the arbitrator's signature. The publication is the completion and termination of the arbitrator's functions, and it may sometimes, for certain purposes, stand in lieu of notice and delivery to the contending parties.*

* Lord St. Leonards, in his *Handy Book of Property Law*, alludes to *publication* in the case of wills. He says that the necessity for

To avoid the stamp duty, or from other motives, the arbitrators sometimes give a *certificate* instead of an award. This is rather substituting one form for another than effecting any material object.

The award being thus completed, it remains that it be delivered into the hands of the parties concerned. The arbitrator keeps possession of the award and documents until the costs of it are paid to him : for it is doubtful whether he have a legal remedy for the fees after having parted with the papers. Theoretically, it is immaterial which of the two contending parties takes up the award by paying the costs and carrying away the documents ; for neither can alter it, and both are bound to abide by its contents. Practically, however, it is convenient that the gaining party should have possession of that which will be his weapon. The other side would indeed not procure eventual good to himself by concealing or destroying the award already published adverse to his interests ; but independently, the manner in which the payment of costs is arranged by the arbitrator is generally such as to contemplate the gaining party handing the fees to the referee ; and they seem to come with greater propriety from the side which receives advantage by the adjudication. In order to secure this end, a slight but innocent artifice is used :—notice is sent to each party that he can have the award upon payment of the fees ;

publication of a will has been taken away by the late Act, and that before the recent enactment the word had no precise meaning. What he adds is very memorable : “ that though ‘ publication ’ of wills was abolished, yet so inveterate is habit, that the word ‘ republished ’ has found its way into the Act itself.” No doubt the publication of an award is a thing of the past, and only lingers among us, like other superstitions, *which we disbelieve but fear*.

but the notice to the party who would properly take up the award is usually sent in advance of the other, so as to render it probable that he will be the first to apply for its delivery. Should, however, the unsuccessful party come first for the award, an unstamped and unsigned copy may be given him, and the stamped and signed copy be kept for the profiting party.

Of Costs.

The questions relating to costs which come before an arbitrator are comprised under three heads:—

Firstly. Those which relate to the litigation, when a cause has been referred out of court, or by litigants themselves to end the strife. They are called *Costs of the Cause*.

Secondly. Those which are incurred in the proceedings of the arbitration itself; the submission, the attendance of witnesses, &c. These are called *Costs of the Reference*.

Thirdly. Those of the arbitrator for his own remuneration, drawing the award, &c. These are the *Costs of the Award*.

And the following courses may be taken respecting costs in submitting matters to reference:—

1st. The submission may be silent as to costs.

2ndly. The submission may give the arbitrator power over part of the costs, or the whole.

3rdly. It may prescribe definitely as to costs.

4thly. It may direct that the costs shall “abide the event.”

With respect to the first of the positions, when the

submission is silent as to costs, the arbitrator may be silent too. The result of his decision decides also the costs of the cause, if the matter is one already litigated. The costs of the reference are disposed of by each contesting party paying his own costs; and the costs of the award are to be equally divided between the parties submitting.

In the second case, when costs are left in the discretion of the arbitrator, he not only may but must decide upon them in his award. They are then in his power entirely, with certain legal limitations; and he can, where necessary, include in the costs those of making the award a rule of court. It is said that he ought not to adjudicate as to his own fees: but this seems practically a needless piece of delicacy, for he will decide in some form. They will necessarily enter into his thoughts in fixing the final sums to be paid by one party to the submission, and he is careful not to allow his award to be seen until the costs of it are paid to him. In fixing the onus of paying the expenses of the reference, (that is, the expense attending the arbitration,) and of the award, the arbitrator will be guided mainly by the consideration whether the opposition of one party was groundless and vexatious, or whether, although the cause might be decided entirely against one party, there were sufficient circumstances adhering to the subject to give him a *primâ fronte* right to have the matter referred; thus justifying him in his delay and the necessary expenses incurred.

Thirdly, when the submission prescribes definitely as to costs, the arbitrator is saved the trouble of that part of his duty. His care in this case will be not to inter-

fere with them farther than in fixing his own, and procuring payment of them.

Fourthly, if costs are directed in the submission to "abide the event," the question remains what is "the event" intended? Generally it means the arbitrator's decision. But it requires a distinction to be drawn when cases are referred out of courts of law :—as when instead of the jury finding a verdict, the cause is interrupted and is referred to an arbitrator. Sometimes not only the special part of a dispute, concerning which part a trial took place, but all the questions and differences between the contending parties are left to him; and his finding on the whole case might be different in result from his finding in respect of that portion where his decision is equivalent to a verdict.

When costs are "to follow the event," and the arbitrator awards some matters to each party to the reference, there is no general event; and costs cannot be decided, nor are distributable.*

OF THE ENFORCEMENT OF AN AWARD.

However desirable arbitration may be shown to be as a substitute for litigation, it would lose its value, and indeed must fall into disuse unless there were means at hand for enforcing the award when made. For although in some cases the parties to a reference would abide its consequences, and perform the directions of the arbitrator without demur, other persons, disappointed or indignant at the award being adverse to them, would seek to evade

* *Maisack v. Webber*, Q. B. 1860, L. T. R. 54.

it, or throw obstacles in the way of its fulfilment. There is a latent hope in the breasts of most people that results may prove favourable to themselves: indeed, it has been said that the best proof of the correctness of an award is the *dissatisfaction* of both the parties concerned in it at the result. It therefore requires that the domestic tribunal should be backed by the strong hand of the law, either by its actual interference, or by the moral support given by a known power of access to it.

And the methods of enforcement both in law and in equity are numerous and easy. In concluding this chapter a short account will be given of them. It must be remembered that these means are not themselves part of the proceedings of arbitration, and in point of honour ought not to be required to be resorted to. Before being adopted, a reasonable time should be allowed to the losing party for performing the award, after which he may be held to the mutually-signed agreement by legal proceedings.

The most obvious and usual mode of enforcement is an action at law. This can be brought upon any award whether the submission contained a provision for making the award a rule of court or not, or if the matters were submitted by parol. The particular form of action, whether of debt, assumpsit, on case, or of covenant, will be determined by the particular circumstances and the recommendation of the party's legal adviser. But an action at law may be also resorted to by the losing party as against the enforcement of the award. Probably, in the majority of cases where rights and property are affected by the arbitrator's decision, an injunction in Chancery would be the more

efficacious remedy to prevent its course.* A few years ago, the dilatory state of proceedings in equity prevented many persons from resorting to that forum where time was of consequence to them; but now, from the great acceleration of business in those courts, that objection is removed and a less expensive remedy is obtainable.

When proceedings are brought in Chancery they are by bill, or by motion. Although the court would not be made an instrument to enforce an unrighteous or erroneous award, it will take a view possibly differing somewhat from that in which the common law regards the subject, and it will not refuse to lend its aid because an award may seem to be unreasonable; for it considers that great and binding powers are voluntarily conferred on arbitrators by the parties in dispute, *proprio motu*. Nor will the action of the court be prevented by the knowledge of proceedings in common law being taken simultaneously, but having a specific object; such as an attachment against the person of the defendant to compel him to perform some act or obey the award.

When the submission has been made a rule of court, an attachment will lie against the losing party to an award who refuses to perform it, on the ground of its being a contempt of court: and this both in law and equity. Attachment is the severest method of dealing with an award: and when this course is pursued it is not permitted to a party to seek to enforce his award by action at the same time. By an attachment the party in

* See *Pickering v. Cape Town Rail and Dock Co.*, coram V.-C. Wood, L. T. R. 1865, p. 357.

contempt is thrown into prison, where he will remain until, by payment of the award or other performance of it, he gets relieved.

The other forms of proceedings on an award are by execution, by pleading it, or producing it in evidence, &c. Thus an award can be supported; and the same means become also the weapons for resisting the claims of the person in possession of the award. Except when an action at law is founded on an award, for then it does not require it, it is necessary to make the submission a rule of court. There is no restriction in point of time for taking this step, and it may be taken indifferently by either party to the arbitration. A submission may also be made a rule of court under the Act of 9 and 10 William III. It may be procured both in term and in vacation.

When the party to an award who is the loser resorts to law to set it aside or protect him from its effects, it requires, if his complaint be of the corrupt practice of the arbitrators, that his application to the court should be made within a certain specified time after the award has been *published*; the period allowed being such as to give the complainant an entire clear term after publication. This publication we have seen is the finishing stroke of the arbitrator's or umpire's office; it is a mere technicality, and is similar to the "sealing and delivering" of a deed—a form only.

As the views of courts of law and equity are now to support awards whenever they can, they often refer them back to the arbitrator instead of setting them aside altogether. Indeed, when an award is good in part and bad in part, the good part is often culled out, and the

remainder becomes inoperative. The award is frequently referred back to the arbitrator when some error or omission appears on the face of it. When it is thus sent back to the arbitrator for emendation, his power revives, and sometimes it is his duty to hear evidence again *ab initio*. In other cases the arbitrator need not examine witnesses. In subsequent proceedings upon an award the arbitrator himself may be called as a witness in reference to facts relating to it or the parties; but in no case is he to be compelled to state his chain of reasoning, or the motives on which the conclusion was built which was embodied in his award. The mental process of the arbitrator is ever to be inviolate. In *Baker v. Stevens*,* when application was made to the Court to set aside an award on the ground of the excessive charges of the arbitrators—the sum awarded being 503*l.*, and the arbitrators' fees 197*l.* 10*s.*—the Court would not, on this ground even, send back the award. At the same time it expressed its disapprobation at the exorbitant fees charged by the referees.

This tenderness of treatment where the arbitrator himself is concerned throws some light on the manner in which the system of arbitration is viewed by the formally-constituted tribunals. First, it would be inquisitorial to demand of one, invested, as it were, for the hour with the judicial ermine, his inmost thoughts of which his award was the manifestation. And secondly, it would be productive of endless disputes and litigation were the parties allowed to track their judge *pro tempore*, in his ratiocination upon the questions they had left to his

* Bail Court, 1866, L. T. R. 448.

decision. Although in cases referred from the court the arbitrators are most frequently members of the bar, yet in mercantile and agricultural pursuits the reference is generally made to a layman, a person intimately, because practically, acquainted with the matters in discussion. Such men have methods of arriving at truth unlike the logical forms by which strict reasoning is guided. Unversed in theoretical investigation, they are sometimes rather led to their conclusions by an instinct or intuition, which in many instances shows itself to be a trusty guide. In other words, tact, experience, and knowledge of mankind lead them to an end which is right. It would therefore be altogether unwise to lift the veil, or show the quaint processes of the workman's art. The jealousy which once prevailed in the minds of judges of the interference of lay tribunals, no longer exists. Lord Campbell, in delivering judgment in the House of Lords, in *Scott v. Avery*,* said, in support of the validity of an Arbitration Clause in the rules of a Marine Assurance Association: "What pretence was there for saying that because this association wished to avoid being distressed by continual actions, and preferred referring disputes to a domestic and private tribunal among themselves, that they had no right to do so? That would be most inexpedient, and would be a violation of the liberty of the subject. He (Lord Campbell) could see no ill consequences, and he saw great advantages, from the practice. He knew that great obstacles had been thrown by the courts in the way of proceeding by arbitration; but with respect to

* Writ of Error, H. of L. 10th July, 1856.

his learned predecessors, he would let their Lordships into the secret of their doing so. There was no disguising the fact, which was, that formerly the chief part of the judges' salaries depended upon fees, and there was a great desire, therefore, to have as much business as possible brought into Westminster Hall. One description of procedure took causes into the Court of Queen's Bench, another into the Common Pleas, and a third into the Exchequer,—but arbitration took them out altogether, and therefore robbed the judges."

By the maintenance, where practicable, of awards, it is important to observe that the judges, the exponents of the law, do not encourage a litigious spirit. They see in the course of their daily task too much of the selfish contentions of mankind, too much of the pugnacious side of human nature, to wish to add to or foment strife. They would rather see it set at rest by the intervention of friends or by the self-constituted and prompt tribunal of the arbitrator's chamber. When, therefore, it becomes necessary absolutely to set aside an award, it indicates some glaring and essential error or some fraudulent procedure or some incompleteness in itself, which renders the award inoperative.

Against misbehaviour of the arbitrator, in many cases the only remedy is by bill in equity ; * but in all cases where the submission has been made, or can by its provisions be made, a rule of court, the Statute of William III. provides for setting it aside on complaint. There may be legal misconduct in an arbitrator when no moral wrong is attributed to him. He may have over-

* Russell, p 634.

leapt rules and committed solecisms in practice which it would be impolitic in the judicature to overlook, for they may have had an injurious effect on one of the parties concerned. For a mere or solitary mistake of the arbitrator the courts would probably not interfere to set aside the award; they would possibly send it back to be amended. But an award might be set aside for more essential vices: as its being made after the time to which the arbitrator's power extended; irregularities in taking the evidence; when the arbitrator exceeds the authority confided in him; where the award is of such a character that it does not settle and conclude the questions sought to be decided; and when the award is substantially inconsistent and repugnant. And Lord Eldon, quoted by Mr. Russell, said of the Act of William III., that though the Act was silent as to mistake or error of the arbitrators, "yet it is now settled that an award may be set aside from error or mistake if admitted by the arbitrators." *

Lastly, the award may be set aside from the bad conduct of the parties themselves, fraudulent concealment on the part of witnesses, &c. But even when the testimony of witnesses is impugned, the courts will not lend an over-ready ear to such complaint, because they consider that cross-examination and other means of investigating and ascertaining the truth might have been resorted to.

The cause-list is fruitful in cases concerning arbitration. With few exceptions the later decisions appear all to look one way, viz., a desire to countenance and uphold

* Russell, p. 658.

the proceedings of the arbitrator's inexpensive tribunal. Thus, in *Hodgkinson v. Fernie*,* the Court expressed itself disinclined to interfere with an award, stating that the arbitrator was "sole and final judge of law and fact." In *Anning v. Hartley*,† mentioned previously, the Court supported an award in spite of some irregularities in signing and taking evidence, but involving no misconduct of arbitrators, to whom it was sent back to be rectified. An arbitrator cannot, however, call back an award, alter it, or issue a new award in its place on the ground of the original award containing even a clerical error, on his own authority. If to be corrected, it must be referred back to him by the Court. See *Mordue v. Palmer*,‡ in which the Lords Justices reversed the order of V.-C. Bacon. Mellish, L.J., said, "It was to be considered as settled that whenever an arbitrator had signed and published his award, he was *functus officio*, and could not alter it." *Hogg v. Burgess*,§ carries out the principle of non-interference, although the reference is a compulsory one under the Common Law Procedure Act of 1854. And in *Fryer v. Shaw*,|| the Court would not disturb the award, although it had been made *ex parte*, one party to the reference having gone away prematurely, under the impression that there would be a notice of another meeting. In *Decomyn, Badart & Brooks*, the award, as mentioned previously, was set aside on account of the arbitrator's irregularity.¶

* Common Pleas, November, 1857.

† Exchequer, January, 1858.

‡ Appeal, Lords Justices, November, 1870, L. R.

§ Exchequer, May, 1858.

|| Exchequer, May, 1851. ¶ Bail, 1867, L. T. R. 397.

A cause * adverse to an arbitrator's award was that of *Roberts v. Eberhardt*, which was set aside by the Court on account of informality as to costs, and the arbitrator having taken costs out of moneys he held as receiver. But in *Baker v. Stevens*,† previously cited, the award was supported in spite of the exorbitance of the arbitrators' fees.

Of the latest cases, *The Tharsis Sulphur Company v. Loftus*,‡ protected an Average-Adjuster against an action complaining of the Adjuster to whom was submitted the decision of a disputed matter, for not having used due diligence in ascertaining the facts, and for negligence in the performance of the duty he had undertaken for reward. To this declaration there was a demurrer, on the ground that the duty the defendant had undertaken was that of an arbitrator, and that, as such, he was not liable to such an action. The Court were of opinion that judgment must be for the defendant. There was no case to be found in the books in which such an action had been maintained. The plaintiffs and the person with whom they had a dispute had agreed to accept the judgment of the defendant on the matter in dispute, and to take it "for better or worse;" and the plaintiffs having taken the chance of a judgment in their favour, could not now turn round and sue the arbitrator because it was not so. Judgment was for the defendant.

Still more important is the decision given (21st Nov., 1883) in the case of *Frazer & Co. v. Ehrensperger & Co.*,§

* Common Pleas, 1857.

† Bail, 1866, L. T. R. 448.

‡ C. P. Nov. 14, 1872, *Banco*. Times, L. R. 15 Nov. 1872.

§ Q. B. D. *banc*. Times, 17th and 21st November, 1883.

by which decision, one party to an arbitration is allowed to revoke, at any stage of the proceedings but before the arbitrator's award had been made a rule of Court. The arbitrator acted *ex parte*; and the submission was the usual clause contained in contracts for sale and purchase of cargoes of produce. Where the power of revoking and withdrawing from a reference *pendente lite* to extend to other cases, the advantages and security of referring questions would be materially reduced. As the cause is likely to be appealed, it is sufficient merely to mention it here.

It may here be noticed that under the New Rules of Practice (November, 1883), where there is a reference out of Court to an arbitrator, attendance of witnesses before him shall be enforced by subpoena, instead of by means of judge's order; and the New Rules also empower the referee or arbitrator to direct judgment to be entered instead of, as formerly, leaving the successful party to move for judgment. Probably, in private arbitrations, where the submission provides that the award may or shall be made a rule of Court, some similar changes may come into operation.

I can hardly call the outline now given of Arbitration more than a sketch of what appertains to the subject of the *domestic forum*. It is quite sufficient, however, in the presence of so large and valuable a work as Mr. F. Russell's Treatise on the Power and Duty of an Arbitrator, to which, as will be seen by my frequent citations, I have been so greatly indebted. Modern law reports also must be watched, as our Courts are fruitful in cases relating to this subject.

APPENDICES.

APPENDIX I.

OPINIONS of counsel, given in 1871, on the question whether coals used for the purpose of assisting a stranded vessel off the ground, and wages paid the crew aiding towards the same purpose, are chargeable in General Average.

N.B. The case in question and the opinions stated thereon were printed in the papers issued by the Corporation, called shortly "The London Salvage Association"; and appeared on the 18th January, 1871.

"THE NYANZA (s).

"Glasgow to Bombay; took the ground on the 9th April, 1870. (See slip 207.)

"Efforts were made to get her off, but with no success until the 13th April, when she was got off, having consumed about 100 tons of coals in the attempts made to float her.

"The vessel was not much damaged and continued her voyage without repairs, and arrived safely at Bombay, 21st May. She left Bombay on her homeward voyage to Liverpool, 1st June. She anchored at Aden, where she shipped some coals. She left the following day, but finding, that, owing to some interruption to the voyage from bad weather, the coals would not last until arrival at Suez, the Captain ran for Jedda. Arrived at Jedda, 8th June, took in coals and proceeded, arriving in Suez, 14th.

"A General Average statement was prepared in which—

"First.—About £182 were charged to General Average for 63 tons of coals bought at Aden '*to supply part of the deficiency caused by the use of fuel in trying to get the vessel off the ground.*'

“Secondly.—About £32 were allowed in General Average, the disbursements of the ship at Aden.

“Thirdly.—£157, for 30 tons of coals purchased at Jedda ‘to supply part of deficiency caused by use of fuel in trying to get the ship afloat.’

“Fourthly.—£55 ‘paid to crew for overtime, assisting to discharge steamer while on the ground in the Suez Canal and reloading, paid in addition to their regular wages.’

“The above are all the facts necessary for understanding the following opinion of counsel.

“Any gentleman who wishes can see the case laid before counsel on application at the secretary’s office.”

OPINION.

“We are of opinion that the cost of the coals does not constitute a claim in General Average against the owner of the cargo.

“In the first place, the outlay does not appear to have been required for the safety of the cargo, which was exposed to no immediate peril; and in the second place, the expense seems to have been incurred to overcome an ordinary peril of the navigation of the Suez Canal. The costs of the efforts made to get the ship off were, it seems to us, referable to the ordinary duty imposed on the owner by his contract of affreightment and not to any authority created by the necessity for avoiding a pressing danger to ship and cargo.

“The case of *Wilson v. The Bank of Victoria* disposes of the point that the expenses are chargeable to General Average because other and greater outlay has been thereby saved. The reasoning contained in the judgment of Mr. Justice Blackburn seems perfectly satisfactory.

“2. It is clear as matter of principle that the wages do not constitute a General Average claim. They are either by custom part of the wages due to the men or they are a mere gratuity. In either case they must be borne by the shipowner.

“(Signed) CHARLES P. POLLOCK.*

“J. C. MATHEW.†

“TEMPLE, 19th December, 1870.”

* Now Baron Pollock.

† Now Justice Mathew.

OPINION.

“ We are of opinion that all the items to which reference is made in our instructions can be successfully objected to, and are not recoverable by the shipowners as General Average.

“ As regards the claim in respect of the allowance to the crew, it is clear that they were bound to do their best for the safety of the ship and cargo, and were not legally entitled to claim any extra remuneration for their services.

“ As regards the other items, which all depend on the hundred tons of coal consumed in endeavouring to get the ship off the ground, we are of opinion that the coals so expended does not form a proper subject of General Average. The general rule is, that no loss by consumption or user of anything belonging to the ship, can be a General Average loss, unless it has been used out of the ordinary course and in a way which it was not ordinarily intended to be used.

“ The consumption of the hundred tons of coal appears to us to have been incurred by the captain in discharge of the ordinary duty of the shipowner, and to fall within the general rule, and not within the few exceptions to it which may be found in the books.

“ Moreover, we do not think that the circumstances stated in our instructions show any such extraordinary or imminent peril to the ship and cargo as would be necessary to enable the shipowner to recover a General Average contribution in respect of a loss similar to the one stated in our instructions.

“ GEORGE E. HONYMAN.*

“ ARTHUR COHEN.

“ TEMPLE, *January 5th*, 1871.”

* Afterwards Justice Honyman.

APPENDIX II.

IN preparation for some contemplated legislation on the subject of Merchant Shipping and Insurance, the President of the Board of Trade issued a Memorandum, dated 30th October, 1883, and in November following put forth a paper of explanation, which two documents were intended as an exposition of his motives in proposing new regulations. In these papers are contained, amongst much other matter not directly concerning a work on Average, some tabulated facts and statistics which are too important to the whole community to be omitted or unconsidered. The following data are extracted from Mr. Chamberlain's Memoranda :—

STATEMENT of British Shipping at five separate dates, showing its general increase, and the increase of steam tonnage :

TOTAL SHIPPING OF BRITISH EMPIRE.

Year.	Aggregate Tonnage.	Steam Tonnage.
1870	7,149,134	1,202,134
1875	7,744,237	2,072,804
1880	8,447,171	2,949,282
1881	8,575,560	3,239,503
1882	8,796,517	3,571,078

The tonnage passing through the Suez Canal was in the same year as follows :

SHIPS OF ALL NATIONS.			BRITISH SHIPS.		
Year.	No.	Net Tonnage.	No.	Net Tonnage.	Approximate Proportion of British to Total Tonnage.
1870	486	435,911	314	289,234	66 per cent.
1875	1,494	2,009,984	1,061	1,454,258	72 per cent.
1880	2,026	3,057,421	1,592	2,432,932	79½ per cent.
1881	2,727	4,136,779	2,250	3,429,777	82 per cent.
1882	3,198	5,074,808	2,565	4,126,245	81 per cent.

The total amount of tonnage added to the British Register in these years was as follows :—

1870	391,831	1881	561,750
1875	502,585	1882	714,521
1880	411,736		

Leaving Mr. Chamberlain for the present, the following statistics are extracted from a letter in *The Times* (November, 1883), the figures being repeated from a pamphlet published by the Administration of the "*Bureau Veritas*," written by Mr. J. T. Dawson, "well known as one of the highest authorities in this country on marine underwriting."

The causes of loss, as regards the casualties involving £10,000 and upwards, may for 1880 be stated as under :—

1880.—SAILING SHIPS.

No.	Percentage of Number.	Cause of Loss.	Value Lost.	Percentage of Value.
34	38	Stranded	£735,000	34
23	26	Foundered	558,000	26
19	21	Missing	529,000	25
8	9	Fire	160,000	7
5	6	Collision	167,000	8
89	100	—	£2,149,000	100

STEAMERS.

No.	Percentage of Number.	Cause of Loss.	Value Lost.	Percentage of Value.
40	42	Stranded	£1,505,000	45
13	13	Foundered	415,000	12
14	15	Missing	521,000	16
14	15	Fire	403,000	11
14	15	Collision	522,000	16
95	100	—	£3,366,000	100

"Stranding," the chief cause of loss, is occasionally only a partial escape from foundering. It is now and then sought as such. It is most common with steamers, because their courses commonly lie nearer to the land, and with them it too often comes of an error which is almost peculiar to the navigation of steamers—that, namely,

of hugging the land and shaving headlands to save time. In the five years ending with 1882, of the whole number of steamers in this class reported lost the percentage value attributed to each form of loss was as follows :—

STEAMERS (per cent. of value lost by).

Year.	Stranded.	Foundered.	Missing.	Fire.	Collision.
1878	53	8	8	5	21
1879	62	13	8	1	16
1880	45	12	16	11	16
1881	49	22	10	2	17
1882	55	14	16	1	14

“This table is worthy of careful consideration. There is a palpable diminution of losses by ‘stranding,’ and an equally palpable increase of the losses by ‘foundering’ and ‘missing.’ More steamers go down at sea, or are never heard of now, than was usual five years ago. Add ‘foundering’ and ‘missing’ together as broadly covering what may be deemed a common form of casualty, and compare the two first years with the two last, and the change is marked thus: In 1878–1879 ‘stranding’ accounted for 120, and ‘foundering’ and ‘missing’ for 37. In 1881–1882 ‘stranding’ accounted for 104, and ‘foundering’ and ‘missing’ for 62. And these three forms of loss, which include everything but the well-defined causes, ‘fire’ and ‘collision,’ have increased in the same period in their proportionate adverse effect from 158 to 166.”

Mr. Chamberlain proceeds to remark, in reference to loss of life at sea and the awaking of the national conscience to its prevalence :—

“Next, as regards injury to trade. It might be a sufficient answer to this objection to say that with the present temper of our people, trade must suffer inconvenience rather than destroy life. But this is not all. The convenience which shipowners, merchants, and underwriters may find in the present system may be all very well for them, and yet a loss to the nation. It may spread the liabilities which ought to fall on their shoulders over the backs of the community, but it is not the less a national loss. The tonnage of British ships lost in the year approaches 400,000, that of ships suffering serious casualty approaches 700,000, and there are innumerable smaller casualties besides. What is the cost of this loss—including that of cargoes—to the British public? It is not easy to estimate it with any accuracy, but it must be enormous. At £10 a

ton 400,000 tons of shipping would be worth £4,000,000 ; at £20, £8,000,000 ; and cargoes are sometimes more, sometimes less, valuable than the ships themselves. Taking all sea casualties together, it would probably be no exaggeration to put the money loss to the nation at much more than £10,000,000 a year."

And then he comments on that dark page of the history of commerce, as follows :—

"It is a most remarkable fact, that the loss of life and of ships has been greater since 1876 than it ever was before.

"This is a startling fact, but published statistics leave no doubt.

"The figures showing the loss of life at sea in British ships are very significant. From a return moved for by Mr. W. H. Smith (Parliamentary paper 143, 1883), it appears that the loss of life has, on the whole, increased since 1875–76, when it was 2,031 ; and that it was 3,372 in 1881–82. It also appears that the loss of life in 1881–82 was greater than in any year since 1867, except in one year, 1873–74, when it was swollen by the loss of nearly 1,200 coolies in two emigrant ships.

"The Wreck Abstracts show that in 1875–76 2,072 lives were lost by shipwreck of British ships, and that the number in 1881–82 was 3,688. These and the following figures are taken from the Wreck Abstracts as they stand. They do not include partial losses of ships, or lives lost in ships not totally lost, neither do they include losses in harbour ; but they do include fishing vessels. For these reasons they differ slightly from the figures in Mr. W. H. Smith's return, and from those recently quoted by Mr. Chamberlain. But the difference in figures is small, and has no effect whatever on the argument.

"The actual number of total losses of British ships at sea in each of the last two years has been larger than in any year upon the record. In 1880–81 there were lost 1,310 ships of 348,186 tons ; in 1881–82, 1,303 ships of 378,424 tons."

The writer of this work is not responsible for the deductions drawn in the Memorandum emanating from the Board of Trade. The number of ships and cargoes lost and the number of lives which have perished stand as facts, deeply to be deplored. Yet it must not be left out of sight that the growth of trade and shipping has been immense : and though the loss of life, which in 1876–7 was 3,051 lives, and in 1878–9 was as low as 2,064, grew in 1881–2 to

the total of 3,978, the tonnage, which was in 1875 7,744,237 tons, had grown in 1882 to 8,796,517 tons, and would carry a corresponding increase of mortality, but not, certainly, in the same ratio with the lives lost. It will be observed in the data above given, that the increase in tonnage consisted entirely in steamships, which amounted to 3,571,078 tons in 1882, against 1,202,134 tons in 1870 ; whilst in the same period, sailing vessels had declined from 5,947,000 tons to 5,225,489 tons, showing a defect of 721,561 tons.

The gain in the saving of life is not remarkable, considering the increased number of life-boats and stations now on our coasts. By the report of the Royal National Life-boat Institution, in 1882, 741 lives were saved on British coasts by the direct agency of life-boats. The present fleet consists, on our coasts, of 274 life-boats.

By the Blue Book of the Board of Trade, the number of lives rescued by life-boat service was in 1881-2, at home and abroad, 671. It had been, however, 700 in 1876-7, and 717 in 1880-1.

The entire number of lives considered to have been saved from shipping, at home and abroad, as far as known to the Board of Trade, was in

	1881-2	.	.	.	.	13,139 lives.
But it was in	1876-7	.	.	.	.	13,785 „
„	„	1877-8	.	.	.	12,191 „
„	„	1878-9	.	.	.	13,152 „
„	„	1879-80	.	.	.	11,205 „
„	„	1880-1	.	.	.	11,703 „

It does not seem, therefore, that the saving of human life has quite kept up with the increased tonnage, and the larger number of life-boats and stations. An inference would be that there is greater risk of life in and owing to steam propulsion, at the present time.

Enough has been here selected from the interesting volume put forth by the Board of Trade. For minute details, its pages must be consulted.

In conclusion, when shall we see a LLOYD'S LIFE-BOAT placed at some dangerous station on our coasts ?

INDEX.

ABANDONMENT,

when by Dutch and French law a shipowner can abandon for average, 166
significance of the act of, 351
sometimes over-valued, 351
effect of, 353 *et seq.*
right to abandon, 353 *et seq.*
method of abandoning, 353 *et seq.*
acceptance or refusal by insurers, 354
convenience of, 354
omission of act, not to oust assurer's claim, 354
when unnecessary, 355
only necessary to a constructive total loss, 355
its true effect, 355
when made on erroneous grounds, 355, 358
influences leading to, or preventing, 357
does not always need to be written, 359
the waiver-clause, 360
whether freight passes to insurers of ship, 360 *et seq.*, and *see* APPENDIX.

late decision in the negative, PREFACE.
a useful preliminary step, 365
where results are uncertain, 366
fixes date for payment of loss, 366
right of abandonment, 367 *et seq.*
involves the idea of option, 368
ship embargoed or captured, 369
vests right to a loss, 370
its importance in time of war, 370
action on notice of, 371
after arrival at her home or destination, 372
not so as to cargo, 372
when at destination the species is preserved, 372
when not necessary, though goods arrive, 373

ABANDONMENT—continued.

- tests of right to abandon ship, 373
- right does not pass by mere possession of policy, 377
- of goods, 377 *et seq.*
- importance of right when insured free from particular average, 377
- case of iron, per "Bombay," 380
 - bacon, *Booth v. Gair*, 381
 - rye, *Meyer v. Ralli*, 381
- of freight, 387
- owner giving up freight not always an, 387
- motive to be examined, 387
- when owner has a right to abandon freight, 388 *et seq.*
- a vessel derelict, 391
- method of abandoning, 392 *et seq.*
- notice in writing on parol, 392
- what is sufficient for a notice of, 392
- notice should be direct and explicit, 394
- but not restricted to a particular form, 394
- must be given in proper time, 395
- insurer must accept or reject within reasonable time, 395
- in case of double insurance, 396
- right of assured to elect which policy, 396
- when insurances overlap, 396
- of ship, whether freight ceded to abandonee, 433
- in slave trade, captured, 435
- when erroneous, 436
- when ship cannot be rendered navigable except at excessive cost, 470

ACCIDENT,

- the foundation of claims for average, 220
- distinction between incident and, 221.

ADIT EXPENSES,

- charges going into port of distress, 164

ADJUSTMENT

- of general average, 138
- shipowner obliged to have average adjusted, 141
- who adjust statements, 136
- erroneous foreign statement not binding, 164
- foreign, not accepted as for particular average, 165
- of claims on club policies, 517

ADMIRALTY,

- Black Book of ; Sir Travers Twiss' Edition, 21
- Court of, action in collision cases, 240
 - decisions and rules, 241
 - now considers contributive blame, 241
 - its rule to be followed when in conflict with common law, 241

ADVANCE

- of freight, an insurable interest, 347
- liable for general average, 347

ADVANCES

- on freight contribute to general average, 153—156
- also for average expenses, 154

AFFRANCHISEMENT. See FRANCHISE.**AGGREGATION OF CLAIMS**

- on a policy, 443—445

ANALOGY

- of English law in case cited, 166

ANCHORS AND CABLES,

- sacrifice of, 67
- when claimable in general average, 67 --68
- when not so claimable, 68—69
- when classed as "Wear-and-tear," 69
- broken, parted, or lost, 210
- how dealt with in mutual assurance clubs, 520

ARBITRATION,

- a remedy for disputes, 524—526
- has been named the domestic tribunal or *forum*, 555
- its usefulness in settling disputed claims, 526
- avoids unnecessary litigation, 526
- number of arbitrators in a reference, 527
- their necessary qualifications, 527
- the third arbitrator, 527
- distinction between him and an umpire, 527
- reference out of court frequently to a single arbitrator, 528
- each party names an arbitrator, 529
- advocacy, 529
- umpirage, 529, 530
- proceedings in, 531, 537, 551
- sometimes attended by counsel or solicitors, 532
- what persons may refer, 532

ARBITRATION—*continued*.

- submission to, its form and its effect, 533
- how far courts of law will interfere, 533—534
- the arbitration clause in clubs, 534
- whether it ousts courts of law, 534, 555
- different degrees of formality, 535
- informal manner of submitting to, 535
- “usual terms,” 536
- what this implies, 536
- various powers and rights conferred, 536
- a domestic court of justice, 537
- how costs are to be dealt with, 530
- deference and support given to, 539
- when partiality is shown, 542
- how evidence taken, 544
- limit of time, 545
- power to enlarge the time, 546
- lunar months, 547
- arbitrator's powers revocable, 547
- stopped by death of one of the parties to, 548
- but not as to others when several parties are included in one submission, 548
- ex parte* proceedings, 551
- irregularities may be waived by consent, 551
- drawing the award, 552
- two out of three arbitrators may sign, 553
- costs of, 560
- costs of cause, of reference, and of award, 560
- when they “abide the event,” 562

ARBITRATION CLAUSE

- in mutual clubs, 534

ARBITRATORS,

- number of in referred cases, 527
- qualifications of an arbitrator, 527
- third arbitrator, 527
- distinguished from umpire, 527
- all three arbitrators of equal authority, 528
- the third has practically some superiority, 528
- usually three in private cases, 528
- references out of Court usually to a single arbitrator, 528
- one named by each party in dispute, 529
- thus somewhat in the position of advocates, 529
- jointly appoint a third, or an umpire, 529
- importance of selection, 530

ARBITRATORS—*continued.*

must know how properly to proceed, 531
 diligence but not haste, 544
 powers abrogated by making award, 545
 by revocation by either or both parties, 545, 547
 by death of arbitrator, 545
 by marriage of female party to reference, 547
 may inform themselves by inquiries, 548
 must not in so doing delegate their authority, 549
 when three, majority sufficient to sign, 553
 lose power over award when signed, 553
 cannot correct mistakes, 553, 570
 what remedy they have for fees unpaid, 559
 misbehaviour of, 568

ARRESTS AND DETAINMENTS,

loss and damage by, 219

ASSISTANCE. *And see SALVAGE.*

to a ship in distress, 88

ASSOCIATIONS. *See MUTUAL ASSURANCE ASSOCIATIONS.*ASSURANCE ASSOCIATIONS. *See MUTUAL ASSURANCE ASSOCIATIONS.*

ASSURED

permitted by policy to sue, labour, and travel, 385
 right to elect policy in case of double insurance, 396

AVERAGE,

definition of average, 1
 synonyms, 2
 use of word in common parlance, 2—3
 its technical use, 2
 distinguished as general and particular, 2
 origin and etymology of the name, 3—4
 similarity of the name in many languages, 3
 early uses of the term, 4
 contains the idea of burthen, 4
 and of division or distribution, 4
 use of the word in the bill-of-lading, 5
 examples in Venetian Records, 6
 when first connected with marine insurance, the term included
 various kinds of claim, 7
 definition in French *Code*, 7
 learning on the term collected by Mr. Skeat, 8—11

AVERAGE—*continued*.

- several senses under one generic name, 11
- whether this desirable to continue, 11
- nine senses in which the word is used, 11—12
- general average described, 13—17
- bond, 136—139
- adjustment or statement, 138
- connected with insurance, 173
- particular average on ship, 188
- separate kinds of, to be distinguished, 253
- particular average on goods, 256
- embraces four kinds of claim, 256
- sometimes named partial loss, 256
- the average clause, 264
- its advantage to the assured, 266
- water thrown down the hold, 321
- shipmaster's duties and proceedings when under, 492—494
- protest and other necessary documents, 492—494
- on goods, documents necessary, 496—497
- fraudulent claims, 497
- average clause in different mutual clubs, 578

AVERAGE ADJUSTER,

- named *Dispacheur* in many foreign countries, 158
- must observe distinction between general and particular average, 253—255

AWARD

- set aside for umpire exceeding his authority, 543
- not so, when a waiver was inferred, 543
- how it should be arrived at, 544
- when made abrogates arbitrator's powers, 545
- how and by whom drawn, 551
- when three arbitrators, may be signed by majority, 553
- when once signed out of arbitrator's power, 553
- mistakes cannot be corrected, 553
- must deal with all points submitted, 553
- must not substitute an alternative, 553
- Courts sometimes uphold an erroneous, 554
- affected by a gross error, 555
- if losing party can appeal from, 556
- form in which it is given, 557
- may be by parol, 557
- recommendation as to its contents, 557
- publication and delivery of, 558
- certificate sometimes substituted for, 559

AWARD—*continued.*

- to whom delivered, 559
- costs of, 560
- how it deals with costs, 560
- costs to "abide the event," 562
- enforcement of, 562
- by action at law, 563
- when in chancery, 564
- made rule of Court, 564
- sending back an award, 566

BARRATRY,

- origin of the name, 399
- its meaning, 400
- only applied in insurance, 400
 - and in some bills of lading, 400
- present enlargement of its meaning, 400
- its definitions in English law, 400
- a crime, by English law, 401
- must be without cognisance of owner, 401
- how described in Merchant Shipping Act, 401
- not a frequent ground of claim, 402
- owner's collusion, 402
- wilful destruction of ship, 403
- smuggling, 404
- deviation from voyage, when barratrous, 405
- misconduct of master and crew, 407
- case of *Wilson v. Ranken*, 408
- negligence: *Grill v. General Iron Collier Co.*, 411
- does not affect insurers, in France, 413

BILL OF LADING,

- contains the term *Average*, 5
- explanation of its meaning, 6—7
- ancient instances of its introduction, 6
- Chaldean cylinders, 23, *note*.

BLACK BOOK OF THE ADMIRALTY,

- ship's contribution to General Average, 24
- not, at first, to jettison, 24

BOARD OF TRADE,

- returns of sea-casualties, 238, and APPENDIX.
- of collisions, 238

BOATS,

- when allowable in particular average, 211

BONDS. *See* BOTTOMRY, AND RESPONDENTIA.

BOTTOMRY,

- one means for raising funds, 122—134
- distinction between bottomry and respondentia, 123
- defeasance of bottomry bond, 125
- description of bottomry bond, 126—134
- necessity for communicating with owner and others, 128
- valid and colourable bonds, 127
- irregular forms of bond, 130
- collateral bonds, spurious, 130
- second bonds, 132
- cargo sold for payment of bond, 133
- whether bottomry to contribute to General Average, 134
- holder of bond entitled to collect General Average, 143

BROXBORNEBURY,

- case of the, 459

BULK-GOODS,

- how average payable, 328—331

BUOYS AND BUOY-ROPES,

- their loss follows loss of anchors and cables, 70

CAPTURE

- gives right to abandon to the insurers, 371
- in consequence of smuggling, 404
- of ship engaged in the slave-trade, 435
- ship sunk by Russian gunboats, not capture, 437

CARGO,

- if entire cargo jettisoned, 58, 59
- discharge of, in port of distress, 94
- warehouse rent, 93
- reshipment of cargo, 93
- sold for payment of bottomry bond, 133
- funds raised for, by respondentia, 123—134
- sold to pay average disbursements, 134, 135, 423
- value to contribute to general average, 144
- including goods jettisoned, 145
- lost in boats and craft, 273
- sold short of destination, 275 *et seq.*
- freight payable thereon, 281'
- damaged by forced discharge, 322

“CAUSA PROXIMA,” &c.,

- a very current dictum in law, 65
- the principle considered, 65—67

"CAUSA PROXIMA," &c.—continued.

must not be pressed too literally, 65 · 67
compared with the *causæ causa*, 66
Lord Selborne's remarks, 67
consideration of this principle, 108—110

CHAIN CABLES,

one-sixth deducted from, 28
when claimable in general average, 67—68
when classed as "wear-and-tear," 69
testing necessary, 211

CHARGES. Also see EXTRA CHARGES.

special on freight, exploded notions about, 340
not to be included by law, in particular average, 384

CHRONOMETERS,

to whom belonging, 432

CLAIMS,

recovery in collision cases, 250
uniting claims, 251
consecutive, 251
as to costs, 251
for particular average, 256 *et seq.*
aggregation of, on policy, 443—445

CLUBS. See MUTUAL ASSURANCE ASSOCIATION.

COALS,

extraordinary expenditure of, 75—78
difficulties of the subject, 75—78
used for moving ship to shipwright's yard, 78

CODE DE COMMERCE,

definition of average, 7
enumerates eight heads of General Average, 21, *note*

COLLATERAL BONDS. See BOTTOMRY.

COLLISION,

a fruitful source of damage, 237
most frequently occurs near coasts, 237
tables illustrating frequency of, 238, and APPENDIX.
causes of, 239
ship in fault, 239
degrees of fault, 239—240
who bears the expenses of, 239
four possibilities in collision, 239
rule of Admiralty Court as to damages, 240

COLLISION—*continued.*

- whether a perfect one, 240
- distribution of damages and blame, 240—242
- contributive blame considered now by Court of Admiralty, 241
- examples of collision as affecting insurers, 242
- goods injured by, 244
- collision clause, at large, 245
- based on or refers to Merchant Shipping Acts, 245, 246
- limitation to £8 or £15 per ton, 246 *et seq.*
- not to be added to damage received, 248
- intricacy of some claims for, 249
- serious possible consequences of, 249
- recovery of claims, 250
- costs in, 251
- colourable attack, 252
- underwriter's consent, 252
- causes of, 252
- in some insurances voids the memorandum to goods, 259
- if "occasioned" by, 262, *note*

COMMISSIONS AND PROFIT,

- losses on, 472
- non-arrival of goods, 473
- no salvage on sales, 474
- profit lost on a timber cargo, 475

COMMITTEE OF LLOYDS,

- their agents enforced to cause selection of damage, 312
- notify missing ship as lost, 350

CONDITIONS PRECEDENT,

- payment of premium, to an insurance, 481
 - or undertaking to pay, 481, *note*
- seaworthiness of vessel, 480, 481

CONFLICT OF LAWS,

- English and of some foreign countries, 166

CONSEQUENCES,

- how far they extend from initial Act, 15
- foreign view of, 16—18
- goods in hold damaged during a jettison, 34—37
- consequential damage by spars, &c., 78
- damage to cargo by water to extinguish a fire, 84—87

CONSEQUENTIAL DAMAGE. *See* CONSEQUENCES.

CONSTRUCTIVE LOSS,

- of goods, 275 *et seq.*
- of ship, 451
- its nature misunderstood, 452
- subject open to uncertainty, 452
- existence *in specie*, but not value, 453
- legal views of the subject, 453
- its usual forms, 454
- ship's constructive death, 454
- difficulties of applying rules, 455
- dependent on estimates, 455
- three values required, 456
- contributive causes to loss, 458
- case of the *Broxbornebury*, 459 *et seq.*
- not to depend on owner's option, 466
- on goods, 470

CONTRACT

- made by policy, 177
- as a deed of indemnity, 177
- of the collision or running-down clause, 245
- founded on the Merchant Shipping Acts, 245—246

CONTRIBUTIVE BLAME AND DAMAGES,

- apportioned in some foreign countries, 241
- principle accepted in English Admiralty Court, 241
- examples of incidence on insurers, 242

CONTRIBUTORS TO GENERAL AVERAGE,

- primary contributaries, 136
- how held, by bond, &c., 136—139
- the ship, value to contribute, 143
- the cargo, value, 144
- the freight pending, and advanced, 146
- if voyage voluntarily abandoned, 148
- not human lives, 150
- case of the *Fusileer*, *ad referendum*, 150
- reasons for its general exclusion, 151
- bottomry loans do not contribute by English custom, 152
- whether this is reasonable, 152
- advances contribute, 153—155
- on foreign adjustments, 157
- as to values taken in foreign statements, 159—163

CONTRIBUTIVE CAUSES OF LOSS,

- combination of causes, 458
- case of the *Broxbornebury*, 459
- private, and necessitated repairs, 467—470

COSTS

- how recoverable in collision, 251
- for colourable attack, 252
- insurers' consent before undertaking, 252

COTTON

- picked and made merchantable, 324

COURT OF ADMIRALTY. *See* ADMIRALTY.

COVERING PREMIUM,

- simple operation, 345

CRAFT-RISK,

- sometimes difficulties about, 261
- overlapping sea-insurance, &c., 261
- craft and boats, 273

CREW,

- can their services be considered extra ? 89
- when their exertions should be classed as general average, 90
- wages when detained to claim in case of salvage or collision, 98
- not claimable in other cases of detention, 101—102
- but allowed by special rule in mutual clubs, 102
- misconduct of, 407

CUMULATION

- of claims under running down risk, 249

CUSTOM OF LLOYDS,

- as interpreting policy of insurance, 178
- alleged and vague customs, 186

DAMAGE

- to goods by prejudice, 315
- consequential damage, 315
- by fumes and smell, 315
- by sweating, 316
- by stained packages, 316
- by oil, 320
- by fresh water, 321
- by water, by fire, and by both, 321
- by forced discharge of cargo, 322
- estimates of damage, 323
- picking cotton, 324

DECK,

- goods shipped on, at shipper's risk, 54—58
- deck load ; case of *Wilson v. Rankin*, 408

DECK-JETTISON,

- goods on deck thrown overboard, 37—41
- legal provisions as to goods on deck, 37—38, *note*
- who are to contribute? 38—39
- of living animals, 39—41
- of dangerous articles, 41
- case of *Johnson v. Chapman*, 42—44
- by whom loss to be borne, 47—50
- wood-cargoes, 50
- how it affects insurances, 50—54

DEFINITION

- of average. *See* AVERAGE.
- of general average, 13—16
- in French code, 21, *note*

DETERIORATION

- of goods measured by difference in price, 289
- at one time and one place, 290
- ratio of, to be applied to value insured, 292
- rule for, laid down in *Lewis v. Rucker*, 297
- occasional difficulties, 298
- gross and net proceeds, 299
- by loss of labels, 317

DEVIATION,

- when barratrous, 405—407
- when justifiable, 406
- to assist a vessel in distress, 406
- when motive of profit supervenes, 406

DISPACHEUR. *See* AVERAGE-ADJUSTER.

DISTINCTION

- of average between general and particular. *See* AVERAGE.

DOCUMENTS

- for average, on ship, 492—494
- for goods damaged, 496—497

DOUBLE INSURANCE,

- when by voyage “and thirty days,” 396
- when by “moored in safety twenty-four hours,” 397

ENEMIES,

- defending ship against enemy, 107—108
- French rule, 108
- damage done by, 217

ENGLISH

- theory of general average, 18—20
- theories of *benefit* and *physical safety*, 19—21

EXCHANGE,

- at what rate, average to be paid, 167—169
- great fluctuations at times, 169
- effect on English underwriters, 169

EXIT EXPENSES,

- going out of port of distress, 164

EXPEDIENCY,

- in what cases appealed to, 35

EXPENSES

- incurred for common benefit a basis of general average, 14, 88—90
- of going into a port of distress, 92—94
- whilst in port and of exit, 93—94
- of documents, 96
- joint expenses when a wreck, 96
- special, as distinguished from general average, 110—111
- whether rightly excluded from general average, 111—119
- adit or entrance expenses, 164
- exit expenses from a port, 164

EXTRA CHARGES

- on damaged goods, 331—334
- fewest in London, 331
- more and heavier in foreign countries, 333
- when paid by buyers, 334
- sometimes concealed, 334
- how they affect the insurer, 334—337

FIRE,

- damage by, 215
- total loss by, 349

FOREIGN ADJUSTMENT,

- not binding here if erroneous, 164
- cannot be made in some places, 164, *note*.
- sometimes conflicts and requires readjusting, 165
- not accepted in respect of particular average, 165
- limitation as to adjusting abroad, 167
- whether legally binding by English law, 170
- by present custom generally accepted, 171

FREIGHT—*continued*.

- warranted free from average under 3 per cent., 344
- insurance on advanced freight, 347
- its effect as to abandoning ship, 357
- whether an incident of ship, 360
- or passes to abandonees in case of loss, 360, 433, and APPENDIX.
- late decision in the negative. PREFACE.
- abandonment of, 387
- owner giving up freight not always an abandonment to insurer, 387
- when owner has a right to abandon, 388, *et seq.*
- insured "free of particular average," 389
- loss on, not defeated by a saving, 389
- case of *Kidstone v. Empire Marine Co.*, 389
- on coolies and advances, 434

FUNDS

- raised for general disbursements, 120—121
- insurance of funds, 121
- raised by bottomry and respondentia, 122—134

GENERAL AVERAGE,

- its meaning defined, 13—16
- description of, and illustrations, 13—17
- a contribution from associated interests, 13
- co-adventurers, 13
- no general partnership, 14
- recourse of a sufferer from a sacrifice, 14
- its basis in sacrifice and outlay, 14
- how far consequences of an act extend, 15
- "a term of art," 16
- "to be explained by custom," 16
- various views respecting it, 16
- foreign opinions, 16—18
- English theory, 18—20
- the "benefit" view, 19—21
- "physical safety" view, 19—21
- whether purposely running ship on shore is, 20
- view in the United States, 20, *note*
- French code enumerates eight heads of, 21, *note*
- jettison, 22
- supposed germ of general contribution, 22
- traces of jettison in antiquity, 22, 23, *note*
- prudent acts not necessarily general average, 25
- contributing values, 29

GENERAL AVERAGE—*continued.*

- weight once proposed as basis for contribution, 29
- loss and damage of goods by forced discharge, 31—34
- inconsistency of present practice, 33—34
- damage to goods in hold during jettison, 34—37
- jettison of deck-cargo, whether general average, 37—41
- contributors to goods jettisoned from deck, 38—39
- cutting away a mainmast, 45—46
- human life, no assignable value to contribute to, 63
- conditions as to sacrifices made, 64
- anchors and cables sacrificed, 67—68
- exceptions, 68—69
- hawsers, warps, rigging, sails and spars, 70—72
- ship purposely run on shore, 79—82
- opposite views on the subject, 79—82
- American doctrine, 82
- English legal view, 82—83
- whether press of sail included, 83—84
- masts cut away, 71—72
- question, ship run on shore, 79—82
- water thrown down hatches, 84—87
- cases decided, 85—87
- other expenses incurred for general benefit, 88—90
- crew's extra services, if allowable, 90
- assistance to ship in distress, 88
- passengers' services, 89
- salvage assistance, 90—92
- putting into a port of distress, 92—94
- expenses in port, when general average, 93—94
- expenses going out of port when general average, 93—94
- case of *Attwood v. Sellar*, 93
- case of *Svendsen v. Wallace Brothers*, 94
- cost of survey, 94
- discharging cargo, rendered necessary, 94
- agency and commission, 95
- cost of documents, 96
- joint expenses when wrecked, 96
- crew's wages, detained to claim in case of capture or collision, 98
- substituted and compensatory charges, 98—100
- cutting through ice, 100
- doubtful and rejected subjects, 101
- wages of crew not claimable in, 101
- ship's materials consumed for fuel, 102—103
- cutting away things already lost, 105
- foreign view more liberal than our own, 106
- defending ship against an enemy, 107

GENERAL AVERAGE—*continued*.

- French *code* on this article, 108
- distinguished from special charges, 110—111
- whether special charges rightly excluded from, 111—119
- means and cost of raising funds for average disbursements, 120—135
- insurance of disbursements, 121
- bottomry and respondentia, 122—134
- whether bottomry should contribute to, 134
- charges paid by sale of cargo, 134
- by whom to be paid, 135—139
- at what time payable, 135—139
- the contributories to, 136
- deposits of consignees against, 137
- when average becomes due, 135
- average bond, 136—138
- collection of, 139
- by whom to be collected, 139—141
- shipowner bound to have average adjusted, 141
- when settled in a foreign place, 141
- holder of bottomry bond entitled to collect, 143
- values for contribution to, 143
- the ship on her value on arrival, 143—144
- with addition for *bonification*, 144
- cargo value on arrival, 144
- value of goods jettisoned to be added, 145
- freight paid in advance contributes, 145
- reason for this practice, 146
- how value of freight ascertained for contribution, 146—148, 343
- various positions of freight contributing, 146—148
- if voyage voluntarily abandoned, 148
- as to human life, 150
- reasons for its exception, 151
- bottomry does not contribute by English custom, 152
- whether this reasonable, 152
- average advances contribute, 153—155
- contribution on foreign statements, 157, *et seq.*
- payable by York-Antwerp rules, 163
- foreign statement sometimes needs re-adjusting, 165
- law in Holland and France, 166
- “by English or foreign statement,” 167
- at what rate of exchange to be paid, 169
- under violent fluctuations, 169
- whether English underwriter is legally bound by a foreign adjustment, 170
- by present custom foreign statement generally accepted, 171

GENERAL AVERAGE—*continued*.

- contribution by freight, 343—344
- on what value it contributes, 343—344

GOODS

- injured or lost by a forced discharge, 31—34
- inconsistency of present practice, 33—34
- carried on deck, legal provisions as to, 37—38, *note*
- jettisoned from deck, 47—54
- shipped on deck at shipper's risk, 54—58
- damaged by water thrown down hatches, 84—87
- legal decisions on the subject, 85—87
- injured by collision, 244
- or merchandize, insurance on, 257
- how insured, 257
- risks insured against, 258
- in boats and craft, 259
- delay in landing, 260
- liability of some to damage, 261
- power of germination, 262
- partial loss on, 263
- sold short of destination, 263
- total loss of part, 264
- in separate packages, 264
- distinction of species, 264
- lost in shipping and discharging, 272
- in boats and craft, 273
- existing *in specie*, 276
- not deliverable *in specie*, 283
- particular average on, 288
- damage by sea-perils, 289
- deterioration determined by price, 289
- sold-to-arrive price, not allowed, 290
- value a merchant usually insures, 293, 294
- settlement on "the salvage principle," 299
- gross and net proceeds, 299
- rule settled by case of *Johnson v. Sheddlen*, 300
- not reversed during eighty years, 301
- examples of working, 303, *et seq.*
- duties on, 305
- on tobacco and tea, 305, 306
- arguments as to gross and net prices, 306
- excepted articles, 309
- ordinary increase or loss of, 310
- credit and cash prices, 311
- selection of damaged, 311

GOODS—*continued.*

how sound weight ascertained, 310
 selection of damaged from sound, 311
 consequential damage to, 315
 prejudice as to sound, 315
 damaged by fumes and smell, 315
 "sweating," 316
 stained packages, 316
 loss of labels, 317
 liquids, 318
 bursting of bottles, 318
 oil damage, 320
 damaged by fresh water, 321
 water thrown down hold to extinguish fire, 321
 damage by fire and water, 321
 damaged by forced discharge, 322
 estimates of damage, 323
 cotton picked, 324
 various rates in warranty, 325—327
 shipped in bulk, 328—331
 extra charges on, 331—334
 when insured "free from particular average," 377
 whether they may be abandoned, 377, *et seq.*
 iron per the "Bombay," 380
 'the bacon-case,' 380, 381
 rye, per "Unico," 381—382
 neutral goods in a prize ship, 440
 when constructively lost, 470
 fraudulent claims on, 497
 claims when markets are bad, 502

HAWERS AND WARPS,

when claimable as general average, 70
 their ordinary use, 70

HOLLAND,

law of, respecting general average, 165

HUMAN LIFE,

paramount consideration of, 62—63
 no assignable value for contribution to average, 62
 ancient discussions on the subject, 63
 hitherto has not contributed to general average, 150
 case of the *Fusilier* referred to, 150

ICE,

- cost of cutting through, 100
- whether "other than water," 208, *note*
- liability to dissolve, 278, *note*

IMMEDIATENESS, or "CAUSA PROXIMA,"

- often quoted in maritime law, 65
- examination of the principle, 65—67
- not to be pressed too literally, 65—67
- farther consideration of the principle, 108—110

INDEMNITY,

- whether policy of insurance is a contract of, 177—182
- illustrations of its action, 180—182

INDIA POLICIES

- contain distinctions, 327
- deduction in some, of two per cent., 328
- characteristics of, as to average, 339

INSURANCE,

- how affected by deck-loads, 50—54
- when it includes deck-risks, "in and over all," 51—54
- in relation to goods jettisoned, 60—62
- of average disbursements, 121
- as connecting itself with average, 173
- whether policy a contract of indemnity, 177
- sketch of system, 174
- "premium" of, 174
- not found in the Lloyd's policy, 174, *note*
- subdivision of risk, 174
- insurance companies, 175
- underwriters, 175
- common form or Lloyd's policy, at large, 186—188
- on ships, its contents, 188—189
- perils or risks accepted by insurers, 188—189
- wear-and-tear, 190
- melioration, 190
- perils of the seas, 190—194
- on ship's first voyage, 195
- temporary repairs, 196
- theory of "thirds," 197—199
- clause of "thirds not to be deducted," 199
- how variously liable in collision cases, 242
- limitation to £8, or £15 per ton, 246, *et seq.*
- damage done not to be added to damage received in ascertaining a claim, 248

INSURANCE—*continued.*

- application of costs in collision, 251—252
- particular average on goods, 256
- subject-matter and scope of, 257
- risks covered by, 258
- warranty or memorandum, 258
- franchise on several kinds of goods, 259
- exceptions for stranding, 259
- and in many insurances by fire or burning, 259
- and in some when caused by collision, 259
- frequently includes boat and craft risk, 259, 273
- usual value of goods insured, 293, 294
- either invoice cost or market price, 293
- freight payable on delivery, not insured, 294
- settlement agreed to be "on salvage principle," 299
- gross and net proceeds, 299
- case of *Johnson v. Shedden*, 299
- fixed the rule of gross proceeds, 300
- not reversed during eighty years, 301
- but still objected to by some, 302
- opposite views illustrated, 303, *et seq.*
- on a package, or its separate portions, 313
- the tobacco clause, 322
- warranty for various goods, 325—327
- on freight, 341
- treated liberally and exceptionally, 342—344
- on freight advances, 347
- abandonment, 353, *et seq.*
- double, "thirty" days, 396
- overlapping, "moored twenty-four hours," 397
- inception of risk when ship is at sea, 485
- Associations. See MUTUAL ASSURANCE ASSOCIATIONS.

INSURANCE ASSOCIATIONS. See MUTUAL ASSURANCE ASSOCIATIONS.

INSURERS,

- frauds on, 497
- various forms of fraud, 499—501
- limitation of liability in collision, 242, *et seq.*
- cumulation of claims under collision clause, 249
- their consent before commencing proceedings, 252
- their risk increased by delay in landing goods, 260
- "goods till safely landed," 261, 272
- not liable for fluctuations of market, 289
- high or low markets indifferent to, 292

INSURERS—*continued*.

- paying for missing ship as lost, 350
- undertaking, in case of her reappearance, 351
- abandonment to, 352
- can accept or refuse abandonment, 354
- who have settled and paid as for total loss, 358—359

INSURERS, *alias* UNDERWRITERS.

- their liability to general average on foreign adjustments, 157
- full discussion on the subject, 158—167
- whether bound by the *lex loci contractus* or the *lex fori*, 158
- liability in collision cases, 242, *et seq.*

JETTISON,

- definition, 22
- accepted as germ of general average, 22
- its high antiquity, 22, 23, *note*, and 24
- found in fragment of Rhodian law, 22
- master not bound by law to consult, previous to, 23, *note*
- so too, the French law, 23, *note*
- ship did not formerly contribute, 23—24
- formalities observable, 24
- distinction among things thrown overboard, 24—25
- deliberation in the act, 25
- selection of objects thrown overboard, 25
- should be entered in log-book, 24
- articles not claimable as, 25
- sacrifice and prudence, 25
- articles on deck thrown overboard, 25—26
- freight of goods jettisoned, 26
- value of things jettisoned, 26—27
- of stores, new and old, 28
- contributing value towards, 29
- analogues of, 30
- mediate* jettison, 31
- attendant and consequent damages, 30—31
- goods in hold damaged during jettison, 34—37
- of deck cargo, 37—41, 47—50
- legal provisions as to goods carried on deck, 37—38, *note*
- who contribute, 38—39, 47
- animals on deck, 39—41
- of dangerous articles on deck, 41
- previous security of articles jettisoned, 41
- case of *Johnson v. Chapman*, 42—44
- of entire cargo, 58—59

JETTISON—*continued*.

- remarks on, 60—62
- position of insurers, 60—62
- shipper's right to full value, 60—62

LAW

- of Holland and France, relieving shipowners, 166
- conflict of, 166
- when Admiralty to prevail over common law, 241

LEX LOCI CONTRACTUS, AND LEX FORI,
which to govern the insurance contract? 158—159**LIFE,**

- loss of, at sea, 448, and APPENDIX.
- saving of, 449, and APPENDIX.

LIGHTERS. See CRAFT-RISK.**LOG-BOOK,**

- necessity of entering particulars of jettison, 24

LONDON ASSURANCE,

- year of its incorporation, 7

LOSS,

- partial loss, 274
- salvage loss, 274
- constructive loss, 274
- on freight of goods sold short, 281
- on cargo by fire and water, 321
- on freight, 346
- definition of total loss, 348
- not necessarily annihilation of interest, 348
- constructively a, 348
- by foundering or fire, 349
- missing ship, 350
- notified by Lloyd's Committee, 350
- when posted at Lloyd's dates the loss, 350
- paid for, on ship which reappears, 351
- abandonment to insurers, 351
- only necessary to make a constructive total, 355
- absolute or constructive, 356
- joint expenses with cargo to be considered, 376
- resumption of ship after capture, 376
- whether a thing can be lost, and yet remain in physical safety, 383
- on freight policy, 388, *et seq.*

LOSS—*continued.*

- not defeated by captain's saving act, 389
- case of *Kidstone v. Empire Marine Co.*, 389
- by barratry, 399
- ship's death-wound, 441
- cancel policy, 443
- of life at sea, 448
- contributive causes to, 458
- on profits and commissions, 472
- classification of degrees of constructive loss, 478, 479, *note*

MARINE INSURANCE. *And see* INSURANCE.

- average, name applied to all kinds of claim, at first, 7
- the insurers named "Under-writers," 7
- not an indemnity against every incident, 220—222
- exception in favour of stranding, 223
- distinctions made against groundings in certain localities, 229, *note*

MARINE POLICY. *See* POLICY OF INSURANCE.

MASTS

- cut away, 71—72
- cut away when already broken, 105—107
- sprung during a gale, 209

MELIORATION

- of materials sacrificed, 72
- deductions for, in mutual insurance clubs, 519

MEMORANDUM. *See* WARRANTY.MERCHANDISE. *See* GOODS.

MUTUAL ASSURANCE ASSOCIATIONS,

- founded on the principle of reciprocity, 505
- connected with benefit societies, 505
- insure ships, freight and outfit, 505
- no general solidarity of members, partnership only *ad hoc*, 505
- how affected by Stamp-duties Acts, 506
- insurance without profits, 506
- price of insurance, not premium but in calls, 506
- payment by instalments through the year, 506
- economy of this system, 506
- adjustments to secure equality, 507
- classification of clubs to their object, 507
- methods of equalising the risks, 507
- differential values, 507

MUTUAL ASSURANCE ASSOCIATION—continued.

- constitution of clubs, 509
- management by a committee, 509
- the secretary or managers, 509
- intricacy by daily variation of capital, 510
- general meetings of members, 510
- form of policy, 510
- of which club-rules an integral part, 510
- club rules, 511
- the protection or indemnity varying in different clubs, 511
- rigorous interpretation of rules, 512
- and strict adherence thereto, 512
- danger of departing from rules, 513
- cargo, freight, and outfit clubs, 513
- cargo only when on shipowner's account, 513
- fixed scale as to freight for loaded and light ships, 514
- advantage of clubs when local, 514
- manner of paying losses, 515, 521
- additional payments for extra hazardous voyages, 515
- exceptions made to Suez Canal, &c., 516
- adjustment of claims, 517
- to be by custom of Lloyd's and club rules, 517
- persons entrusted to adjust claims, 517
- the average clause, 518
- difference in various clubs, 518
- deductions for melioration, 519
- yearly alterations in rules, 519
- the 20th of February a usual time for beginning the insurance year, 519
- an accounted voyage, 520
- anchors and chains, how dealt with, 520
- growth and development of the mutual system, 522
- various clubs and their object, 522
- evolution of protection to shipowners, 522
- scarcely at present applied to merchandise, 523
- indications in that direction, 523

NEGLIGENCE OF MASTER AND CREW,

- gross, 412
- need not be barratrous, 412
- when a peril-of-the-sea, 428
- may entail consequences on the owner, 428

NEUTRAL GOODS

- in ship which was good prize ; expenses on them, 440

OWNER. See SHIPOWNER.

PARTIAL LOSS,

- on goods distinguished from particular average, 263
- subject to same conditions in claims, 263
- goods sold short of destination, 263
- arising from reshipment, 267
- losses in shipping and discharging goods, 272
- boats and craft, 273
- the same as salvage loss of ship, 274
- on goods sold at an intermediate port, 275, *et seq.*
- the Hide case, 275
- deduction of freight from proceeds, 281
- effect if adopted, 295—297
- the case of *Lewis v. Rucker*, 297
- of freight on goods sold, 346

PARTICULAR AVERAGE

- on ship, 188 *et seq.*
- perils insured against, 188—194
- limit of claim, 189
- wear-and-tear, 190
- melioration, 190
- deduction of thirds, 192 *et seq.*
- second repairs, 196
- theory of " thirds," 197—199
- first voyage, 195
- objections to " thirding," 198—199
- legal decisions, 198—199
- repairs rejected by insurers, 200—204
- wear-and-tear, 201
- articles lost from deck, 202—204
- why excluded from average, 204
- metal sheathing, 204—206
- damages below water, 206—209
- the Kensington's case, 207—209
- masts sprung during a gale, 209
- sails lost, split or blown away, 209
- anchors and chains, broken, lost, or parted, 210
- boats lost or damaged, 211
- stores and provisions, 212
- ornamental work and painting, 212
- expenses going to place of repair, 213
- damage by fire, 215
- injuries by enemies, pirates, &c., 217

PARTICULAR AVERAGE—*continued*.

- arrests, restraints and detainments, 219
- all other perils, losses, and misfortunes, 219
- all claims must arise from accident, 220
- some repairs and incidents not, 220—222
- stranding, 223
 - meaning of the term in warranty, 223
 - why first introduced, 223
 - original intention of the word stranded, 224
 - why exception in favour of stranding, 224
 - conditions necessary to a stranding, 226—234
 - legal decisions, 229—234
 - groundings not always strandings, 226
 - collision, 237
 - frequency of collision, 238
 - fault, and degrees of fault, 239—240
 - Admiralty rule in cross actions, 239—241
 - illustrations of its action, 242
 - on merchandise, how distinguished, 256
 - claimable in accordance with memorandum, 258
 - which excludes claims below certain rates, 259
 - and on some goods altogether, 259
 - unless ship stranded, sunk, or burnt, 259
 - and in some insurances when caused by collision, 259
 - boat and craft risk, 259, 273
 - insurer's risk increased by delay in landing goods, 260
 - distinction between, and partial loss, 263
 - goods in separate packages, 264, 269-270
 - in series of running numbers, 265
 - "free from particular average," 266—279
 - boats and craft, 273
 - on goods, described, 288
 - how adjusted, 288, *et seq.*
 - must arise from perils insured against, 289
 - not from fluctuation of markets, 289
 - price the measure of deterioration, 289
 - comparison must be at one time and one place, 290
 - price-to-arrive not to be adopted, 290
 - ratio when established to be applied to value insured, 292
 - the rule as to, settled by the case of *Lewis v. Rucker*, 297
 - gross and net proceeds, 299
 - case of *Johnson v. Shedden*, 299
 - rule not reversed during eighty years, 301
 - yet still, by some, objected to, 302
 - examples of the two systems, 303, *et seq.*
 - effect of duties, 305

PARTICULAR AVERAGE—*continued.*

instance of tobacco, 305
 exception made in its favour, 305
 argument for gross proceeds, 306, *et seq.*
 excepted articles, 309
 loss of weight, how ascertained, 310
 ordinary rendiment of weight, 310
 fraudulent claims on goods, 497
 discount and cash, 311
 selection of damage, 311
 enforced by committee of Lloyd's, 312
 not always possible or equitable, 312—314
 sale of sound and damaged, 314
 prejudice, 315—17
 consequential damage, 315—317
 loss of labels, 317
 on liquids, 318
 oil-damage, 320
 fresh-water damage, 321
 on tobacco, 322
 when damage estimated, 323
 compromised damage, 323
 cotton picked and made merchantable, 324
 on goods shipped in bulk, 328—331
 subdivisions of some articles, 330
 otherwise on the whole quantity, 330
 extra charges on damaged goods, 331—334
 when paid by buyers, 334—337
 sometimes concealed, 334
 how such affect the insurer, 334—337
 on freight, 344
 warranted free under three per cent., 344
 does not in law include particular charges, 384
 disadvantage of bracketing charges with loss, 383

PASSENGERS,

their services in emergencies, 89

PEOPLE. *See* RESTRAINTS.**PERILS OF THE SEAS,**

what the term comprises, 190—194
 pirates and enemies, 219
 arrests, detainments, &c., 219.
 “all other perils, losses, and misfortunes,” 219
 stranding, 223
 what constitutes a stranding, 226—234

PERILS OF THE SEAS—continued.

collision (running-down) not, under bill of lading, 249
some acts of negligence, so classed, 428

PETTY AVERAGE,

a former payment, 100

PIRATES,

classes included in this name, 217—218

POLICY OF INSURANCE,

whether a contract of indemnity, 177—182
interpreted by “custom of Lloyd’s,” 178
called also the marine policy, 183
description of the instrument, 183
ancient form of, 183
affected by three conditions, 184—185
written and printed clauses, 185
cumulative concessions, 185
construction against party benefited, 185
to be plainly interpreted, 185
common form or Lloyd’s policy, 186—188
relating to ships, 188
perils insured against, 188—194
the warranty or memorandum, 189
inferior limit of claim, 189
wear-and-tear, 190
melioration, 190
deduction of thirds, 193
first voyage, 195
repairs effected afresh, 196
theory of “thirling” repairs, 197—199
objections, and legal decisions, 198—199
repairs not claimable from insurers, 200—204
wear-and-tear, 201
loss of articles from deck, 202—204
frequently contains collision clause, 244
cumulation of claims under collision clause, 249
part relating to merchandise, 257
what risks it contemplates, 258
warranty or memorandum as to goods, 253
exception in favour of stranding, 259
warranty, why introduced, 261
the average clause, 264
advantage to the assured, 266
against total loss only, 267
particular average undertaken by, 288

POLICY OF INSURANCE—*continued.*

- the tea-clause, 317
- the tobacco-clause, 322
- warranty in respect of several articles, 325—327
- exceptions in favour of some, 325—327
- India policies, 327—328
- distinctions from Lloyd's policy, 327—328
- average on goods in bulk, 328—331
- subdivisions agreed on certain articles, 330
- table of warranties in London policies, 338
- insures freight, 339
- how interest determined, when unvalued, 345
- inception of risk on freight, 345
- on African voyages, 346
- mere possession of, does not confer the right to abandon, 377
- contains the "sue and labour" clause, 385
- loss applied to consecutive policies, 441
- contains proviso, "lost or not lost," 442
- ship for time, no implied warranty of seaworthiness, 442
- concealment by assured, 480
- voids the insurance, 480
- non-payment of premium, 480
- inception of risk on, 485
- expiring on ship at sea, 486

PORT,

- expenses putting into, 92

PORT OF DISTRESS OR REFUGE,

- expenses putting into, 93—94
- expenses whilst in port, 93—94
- expenses going to sea, 93—94
- surveys, 94

PREMIUM,

- the consideration for an insurance, 174
- the word not found in the Lloyd's policy, 174, *note*
- operation for "covering," 345
- sometimes throws light on the risk, 478

PRICE,

- difference of, the measure for establishing claims on goods, 290
- illustrations of insured and market values, 295
- rise and fall of markets, 296—297
- gross and net, 299
- settled by case of *Johnson v. Shedden*, 300
- still objected to by some, 302
- arguments in favour of gross proceeds, 306, *et seq.*

PRICE—*continued*.

- some excepted articles, 309
- credit price and discount, 311
- sound and damaged goods sold together, 314
- effect on price, 314

PROCEEDINGS IN AVERAGE,

- when concerning ship, 492
- the shipmaster's duties, 492—494
- his protest, 492
- documents, 494
- payment of bills, 494
- when concerning goods, 494—497
- documents necessary, 496—497

PRO RATA FREIGHT,

- not recognised by English law, 281
- when justified, 286

PUBLIC ENEMIES. *See* RANSOM.**RAISING FUNDS.** *See* FUNDS.**RANSOM,**

- when general average, 87—88
- why excluded, when paid to a public enemy, 107

REFEREE. *See* ARBITRATORS.**REPAIRS,**

- second repairs, 196
- which not claimable from insurers, 200—204
- some arising from wear-and-tear, 201
- loss of articles from deck, 202—204
- why excluded from average, 204
- metal sheathing, 204—206
- of damages below water, 206—209
- expenses going to a place for, 213

RESTRAINTS,

- “by all people,” 437
- by an Irish mob, 438

RESHIPMENT,

- clause permitting loss on free-of-average goods, when arising from
reshipment, 267
- original meaning of clause, 267—268
- its present legal construction, 268

RESPONDENTIA,

a means of raising funds for cargo, 123—134
how distinguished from bottomry, 123

RHODIAN LAW,

fragment of, preserved, legislates for jettison, 22

RIGGING,

cut away, 71
cut away when already in a state of wreck, 105—107

RISK,

inception when ship is at sea, 485
seaworthiness not warranted or implied on time risk, 487
cases at law bearing on this point, 487—491

ROPES,

sacrifice of, 70, 73
cut away when in a state of wreck, 105—107

ROYAL EXCHANGE ASSURANCE,

year of its incorporation, 7

RULES,

York-Antwerp rules, 163

RUNNING DOWN. See COLLISION.**SACRIFICE,**

a basis of general average, 14
how far consequences of an act extend, 15
jettison, 22—28
prudent acts not necessarily sacrifice, 25
cutting away a mast, 45—47
made for the general benefit, 64
what conditions necessary for general average, 64
press of sail, 83—84

SAILS,

cut away or otherwise sacrificed, 71—72
sacrificed in other ways, 73
press of sails, 83—84
cut away when already in wrecked state, 105—107
lost, split, or blown away, 209

SALVAGE,

- risk of proceeds of sale, 430
- when salvage passes to insurers, 430
- when insurers not responsible for proceeds, 431
- what it consists of, 431
- whether insurers entitled to chronometers, 432

SALVAGE AND ASSISTANCE

- rendered to ship in distress, 90—92
- distinctions drawn between the two, 90—92
- clause, “loss to be settled on salvage principle,” 298

SEAWORTHINESS,

- generally implied in insurance, 480—484
- not warranted on time-policy on ship, 442
- nor that ship shall continue seaworthy after sailing, 484
- what it consists in, 482—484
- ship must be properly manned, 483
- hidden defects, 483
- plea of unseaworthiness difficult to sustain, 484
- unseaworthy from subsequent events, 484
- cases at law, 487—491

SELECTION

- of damaged portion of goods, 311
- instructions from committee of Lloyd's, 312
- not always possible, 312
- sometimes inequitable to assured, 313

SHIP,

- purposely run on shore, 79—82
- legal views, 82—83
- American doctrine, 82
- materials of ship consumed for fuel, 102—105
- insurance on. *See* POLICY OF INSURANCE.
- change from wood to iron, 194
- first voyage, what comprised in, 195
- temporary repairs, 196
- second repairs, 196
- repairs not claimable from insurers, 200—204
- articles lost from deck, 202—204
- metal sheathing, 204—206
- repairs below water, 206—209
- the “Kensington's” case, 207—209
- masts sprung during a gale, 209
- sails lost, split, &c., 209

SHIP—*continued.*

anchors and chains lost or parted, 210
boats lost or broken, 211
stores and provisions lost or destroyed, 212
ornamental work, painting, &c., 212
expenses to place of repair, 213
damage by fire, 215
injuries by enemies, pirates, &c., 217
arrests and detainments, 219
perils, losses, and misfortunes to, 219
stranding and meaning of term, 223
why exception made in favour of stranding, 224
stranding described, 226—234
ordinary and usual groundings, 229
missing ship, 350
no tidings, different periods for, 350
paid for as lost, but subsequently reappears, 350
owner not obliged to abandon, 354
how a prudent owner would act, 373
owner's right to abandon, 367
two tests as to his right of abandonment, 373
resumption of, after loss by capture, 376—377
chronometers, 432
salvage proceeds of, 430
charts and books, 432
inherent decay (*vice propre*), 458
sinking at sea, 459
sale of, when justified, 465—468
not always conclusive, 468
seaworthiness of vessel, 480

SHIPMASTER

must exercise sound judgment, 45
misconduct of, 407
his duties and position, 414, *et seq.*
unusual responsibility, 414
certain attainments necessary, 416
should be a disciplinarian, 417
errors in judgment not always excused, 418
after sailing is a guardian and trustee, 420
his powers as agent for all parties, 421
can bind others by bottomry and respondentia, 421
limits to his authority, 422
permissive acts, 422
condensed summary of his duty and position, 424, *et seq.*
his personal property on board, 432

SHIPMASTER—continued.

- bona fides* as to condemnation of ship, 465
- case of the "Alfred," 465
- his duties and proceedings in case of average, 492—494

SHIPOWNER,

- must be communicated with, 128
- how a prudent owner would act, 373—377, 462
- consideration of uninsured freight, 374

SHIPPER,

- goods shipped at shipper's risk, 54—58
- optional claim for full value jettisoned, 60—62

SHIP'S STORES,

- when diverted from their proper use, 74
- and provisions lost or destroyed, when particular average, 212
- passenger stores, not included in, 432
- chronometers, 432
- iron kentledge, 432

SHORE,

- ship purposely run on, 79—82
- discussion, 80—82
- American doctrine, 82
- English legal view, 82—83

SKEAT'S ETYMOLOGICAL DICTIONARY,

- collected learning on the term *Average*, 8—12

SMUGGLING,

- barratry, when without owner's connivance, 404
- leading to capture, 439

SPECIAL CHARGES,

- as distinguished from general expenses, 110—111
- whether rightly excluded from general average, 111—119
- modern change of view, 113, 119

SPECIES

- of goods, when not obliterated, 276
- not deliverable *in specie*, 281, 283

STATEMENT OF AVERAGE. See ADJUSTMENT.**STATISTICS OF LOSSES,**

- some tables of marine casualties, 447—450
- loss of life, 448, and APPENDIX.
- saving of life, 449, and APPENDIX.

STORES. *See* SHIP'S STORES.

STRANDING,

exception in warranty, 223, 338
reasons why made, 224—225
its effect of destroying the warranty, 226
conditions necessary to a, 226—234
groundings in the Suez Canal, &c., 229, *note*
ship must be out of her course, 231
she must cease to be waterborne, 234
whether reasonable to make exception for, 235
refinements on original intention of, 236

SUBSTITUTED EXPENSES,

how treated in practice, 98—100

SUING AND LABOURING CHARGES,

permission to sue, labour, and travel, part of text of the common
form of policy, 385
somewhat resembles the "waiver clause," 385
clause grown latterly into more importance, 385
conditioning damaged grain held to come under clause, 386
does not comprehend all general average, 386
not simply proceeding at law, 390
saving underwriters on freight policy, 389

SULINA,

mouth of Danube excepted, 273

SURVEYORS,

examination of damaged goods, 280
recommendation to sell, 280
bona fides and judgment required in condemning a ship, 465
case of the "Alfred," 465

SWEATING,

damage to goods by, 316

TAKING AT SEA,

ship sunk by Russian gunboats, 437

TEA,

duty on, excluded in stating claims, 306
the tea clause, 317

THIRDS,

- deducted from repairs, 193
- theory of "thirling," 197—199
- objections by owners, 198
- legal decisions, 198—199
- affecting general average, 199
- word when used means any deduction for melioration, 243, *note*

"THIRTY DAYS,"

- overlapping of two insurances, 396

TOBACCO,

- duty on, excluded in stating claims, 305
- exceptional manner of stating claims, 322
- when policy contains the "tobacco clause," 322

TOTAL LOSS,

- annihilation of interest not necessary, 348
- what the term includes, 348
- removal from owner's possession, &c., 348
- may be constructively a, 348
- loss by foundering or fire, 349
- missing, no tidings, 350
- two kinds, absolute and constructive, 356
- by excess of expenses, 356
- when once settled and paid by insurers, 358—359
- right to claim after abandonment, 370
- goods swallowed up in expenses, 372
- when no abandonment necessary for goods, 373
- by barratry, 399, *et seq.*
- master's effects, insured against, 432
- emigrant's effects, 433
- by enemies, pirates, restraints of kings, &c., 434
- by mutiny of Coolies, 434
- application to policies, 441
- forms of construction, 454
- frequency of, 446
- numerical account of, 448—450
- constructive loss, 451
- definition of, 451
- misunderstanding about, 452
- sinking at sea, 459
- not to be created at owner's option, 466

UMPIRE,

- distinguished from third arbitrator, 528

UMPIRE—continued.

appointed when arbitrators disagree, 528
signs the award alone, 528
may hear all the evidence afresh, 528
his position, 527, 529, 530, 538, 549
exceeding his authority, 543
when his proceedings justified by a waiver, 543
sometimes formerly called "daysman," 550

UNDERWRITERS. See INSURERS.**UNITED STATES,**

running a ship purposely on shore classed as general average,
20, *note*
decisions of courts, 20—21, *note*
goods damaged in hold during jettison, 36

VENETIAN RECORDS,

mention of average in, 6

VOYAGE,

what constitutes commencement of, 398
"voyage and thirty days," 396
reputed voyage in mutual clubs, 520

WAGES. See CREW.**WAIVER CLAUSE,**

its intention, 360
why introduced in ship insurances, 360
its effect, 360, 371

WARPS. See HAWSERS.**WARRANTY,**

otherwise called "the memorandum," 188
makes an exception in favour of stranding, 224
destroyed by a stranding, 226
what constitutes a stranding, 226—234
as to goods and merchandise, 258
excepts certain articles, 259
franchise at several rates on goods, 259
excludes claims for damage on some, 259
the average clause, 264
to pay partial loss from reshipment, 267

WARRANTY—*continued*.

- why clause introduced, 267—268
- how legally construed, 268
- on goods, various rates of limitation, 325—327
- warranties in India policies, 327—328
- table of, in London policies, 338
- minimum on freight, 344
- of seaworthiness not implied in time policies, 442
- “not St. Lawrence,” takes in the gulf. See ADDENDA.

WEAR-AND-TEAR,

- applying to anchors and cables, 69

WEIGHT,

- comparison of, 310
- how sound weight ascertained, 310

YENIKALE BAR,

- exception to stranding, 273

YORK-ANTWERP RULES,

- general average according to, 163

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